DOCKET

No. 08-1402

Title: Mary Berghuis, Warden, Petitioner
v.
Diapolis Smith

Docketed: May 15, 2009

Lower Ct: United States Court of Appeals for the Sixth Circuit

Case Nos.: (06-1463)

Decision Date: September 24, 2008

Rehearing Denied: February 9, 2009

Questions Presented

Date	Proceedings and Orders
May 11 2009	Petition for a writ of certiorari filed. (Response due June 15, 2009)
Jun 12 2009	Brief of respondent Diapolis Smith in opposition filed.
Jun 15 2009	Brief amici curiae of Connecticut, and Six Other States filed.
Jun 18 2009	Reply of petitioner Mary Berghuis, Warden filed.
Jun 24 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 30 2009	Petition GRANTED.
Nov 2 2009	SET FOR ARGUMENT ON Wednesday, January 20, 2010.
Nov 10 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including November 17, 2009.
Nov 17 2009	Joint appendix filed.
Nov 17 2009	Brief of petitioner Mary Berghuis, Warden filed.
Nov 23 2009	CIRCULATED.
Nov 23 2009	Record received from the U.S.C.A. for Sixth Circuit. (1 box)
Nov 24 2009	Brief amici curiae of Connecticut, et al. filed. (Distributed)
Nov 24 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Dec 14 2009	Motion for leave to proceed in forma pauperis filed by respondent Diapolis Smith.
Dec 16 2009	Extension of time within which to file respondent's brief on the merits to and including December 18, 2009.
Dec 17 2009	Record for U.S.D.C. for Western District of Michigan is electronic.
Dec 18 2009	Brief of respondent Diapolis Smith filed. (Distributed)
Dec 18 2009	Record received from U.S.D.C. for Western District of Michigan (Southern Div)
Dec 23 2009	Brief amici curiae of Social Scientists, Statisticians, and Law Professors, Jeffrey Fagan, et al. filed. (Distributed)
Dec 28 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Dec 28 2009	Brief amicus curiae of N.A.A.C.P. Legal Defense & Educational Fund, Inc. filed. (Distributed)
Dec 28 2009	Brief amici curiae of Charles Hamilton Houston Institute for Race & Justice, et al. filed. (Distributed)
Jan 13 2010	Reply of petitioner Mary Berghuis, Warden filed. (Distributed)
Jan 20 2010	Argued. For petitioner: B. Eric Restuccia, Solicitor General, Lansing, Mich. For respondent: James Sterling Lawrence, Royal Oak, Mich.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAY 11 2009
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No. 08-1402

In the Supreme Court of the United States

MARY BERGHUIS, WARDEN,
Petitioner,

v.

DIAPOLIS SMITH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Attorneys for Petitioner

QUESTION PRESENTED

In *Duren v. Missouri*, this Court established a three-prong standard for determining whether a defendant was able to demonstrate a prima facie violation of the Sixth Amendment right to have a jury drawn from a fair cross section of the community. The circuits have split on the issue about the proper test for determining what constitutes a fair and reasonable representation of a distinct group from the community within the venires (jury pool) under the second prong of *Duren*. The Michigan Supreme Court ultimately concluded that the small disparities at issue here for African Americans (7.28% in the community as against 6% in the venires during the time period measured) did not give rise to a constitutional violation. The question presented is:

Whether the U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which this Court has never applied and which four circuits have specifically rejected.

PARTIES TO THE PROCEEDING

Petitioner is Mary Berghuis, Warden of the West Shoreline Correctional Facility in Michigan. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit.

Respondent is Diapolis Smith, a prisoner in a State correctional facility in Michigan. Respondent was the respondent-appellant in the Sixth Circuit.

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OPINIONS AND ORDERS BELOW

The decision of the Sixth Circuit, *Smith v. Berghuis,* reversing the district court's denial of habeas corpus relief is reported at 543 F.3d 326 (6th Cir. 2008). Pet. App. 1a-37a. The order of the Sixth Circuit denying a motion for rehearing is unpublished. Pet. App. 38a. The district court decision adopting the federal magistrate's report and recommendation is also unpublished. Pet. App. 39a-51a. The report itself is unpublished as well. Pet. App. 52a-143a.

For the State court decisions, the decision of the Michigan Supreme Court in *People v. Smith* is reported at 463 Mich. 199; 615 N.W.2d 1 (2000). Pet. App. 144a-173a. The decision of the Michigan Court of Appeals is unpublished. Pet. App. 174a-204a.

JURISDICTION

On February 9, 2009, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that State asked the Sixth Circuit to rehear was entered on September 24, 2008. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit found that there was a violation of the right to a fair cross section in the jury under the Sixth Amendment.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

The prisoner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The issue whether the State has provided a defendant with a fair cross section of the community from which to select his jury is a significant one.

The seminal case evaluating this issue is this Court's decision in *Duren v. Missouri*, in which this Court examined the absolute disparity between the numbers of the distinct group in the community as against the representation of the group within the venires in determining whether there was a violation of the Sixth Amendment.[1] There have been nine circuits – the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh – that have examined similar disparities as advanced here and found no constitutional violation. Nevertheless, in contrast to the other circuits and in contrast to the standard this Court applied in *Duren*, the Sixth Circuit adopted the comparative-disparity standard, and found that there was a constitutional violation. Thus, if the Sixth Circuit decision is allowed to stand, the question whether there is a constitutional violation for a small disparity depends on where one resides.

The fact that the Sixth Circuit reached this decision in habeas corpus is notable, because the standard under AEDPA requires that the State court's decision on the merits be an unreasonable application of *clearly established* Supreme Court precedent. There is no Supreme Court precedent that has established the comparative disparity test, which is confirmed by the rejection of this standard in at least four circuits. In fact, the Sixth Circuit had not previously adopted this test until this decision. It is not the role of the federal courts in

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[1] *Duren v. Missouri*, 439 U.S. 357 (1979).

habeas to adopt new standards such as the one adopted here.

And on the merits of the issue, the process that the county in Michigan adopted did not result in significant differences between the number of African American jurors within the venires (jury pool) as measured against the number of adult African Americans in the community – only a 1.28% difference during the six-month period that was measured. The processes that the county employed to draw in the jurors were facially neutral and reasonable. In contrast, the standard imposed by the Sixth Circuit will require the State of Michigan to use processes that identify every person's racial and ethnic identity to ensure an identical representation of percentages for distinct groups in the venires, which would operate effectively as a quota system. The Sixth Amendment does not require this.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Preselink v. Avery* (09-___); *Metrish v. Newman* (09-___); and *Berghuis v. Thompkins* (09-___). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has dramatic consequences for this case, by wrongly vacating Smith's 1993 murder conviction. This Court should grant this petition.

STATEMENT

Diapolis Smith was convicted of second-degree murder after a jury trial in Kent County, Michigan in 1993. Smith was sentenced to life imprisonment with the opportunity for parole. He filed a post-trial motion in which he challenged whether his jury was drawn from a fair cross section of the community under the Sixth Amendment. The Michigan Supreme Court rejected this claim, but the Sixth Circuit determined that this decision was an unreasonable application of existing Supreme Court precedent, reversed the district court's denial of habeas corpus relief, and remanded the matter to the district court to issue an order directing the State to either release Smith or retry him within 180 days.

1. The Post-Trial Motion on Jury Composition

On appeal in State court, Smith raised the claim that there was underrepresentation of African American jurors from Smith's jury venire and that this disparity was a product of systematic exclusion. The Michigan Court of Appeals remanded the matter to the State trial court for a hearing on this claim.

At the evidentiary hearing, the Kent County Administrator testified that the database for jurors was obtained from a list from the Michigan Secretary of State from holders of driver's licenses and identification cards. Pet. App. 152a. The county then sent out a questionnaire to prospective jurors, allowing the prospective jurors to request exemptions either for statutory reasons, e.g., that the person was not conversant in English, or for other personal reasons, including "lack of transportation or child care, or because of work-related matters." Pet. App. 153a154a.

There were five percent of the questionnaires that were returned as undeliverable, and another fifteen to twenty percent did not respond at all. Pet. App. 152a. The county then sent a follow-up letter to the non-responders, and then half of these individuals did respond. Pet. App. 152a-153a. After receiving the questionnaires, the county then summoned the prospective jurors for service. The county allowed this pool of jurors to be first drawn for the city misdemeanor district courts, before the remaining unselected jurors were available for felony circuit courts. Pet. App. 154a.

In 1990, the census indicated that African Americans comprised 8.1% of the population of Kent County, a county in western Michigan, but that the African American population among adults (ages eighteen to sixty nine) was 7.28%. Pet. App. 155a. Relying on this 7.28% figure, the expert statistician who testified at the evidentiary hearing, Michael Stoline, explained that from April to October 1993, Kent County 929 jurors were selected from the Secretary of State lists and that 68 of these jurors would be expected to be African American. But only 56 of these jurors were African American, or 6% of the total. Pet. App. 155a.

The expert then gave a monthly analysis from April 1993 through September 1993, comparing the number of African American jurors that would be expected and the number that were actually drawn in, and that in September 1993 – the time of Smith's trial – the number of African American jurors expected would have been 12, but only 8 were present (as rounded to the nearest whole number). Pet. App. 155a.

The State trial court denied Smith's motion for new trial. Pet. App. 205a-212a.

2. The Review in the State Appellate Courts

On appeal to the Michigan Court of Appeals, the Court reversed in a 2-to-1 decision, concluding both that there was underrepresentation of African Americans and that this underrepresentation was systematic. Pet. App. 174a-183a.

The Michigan Supreme Court unanimously reversed. In applying the three-pronged *Duren* test, the Court acknowledged that African Americans were a distinct group, but concluded that Smith had "failed to establish a legally significant disparity under either the absolute disparity or comparative disparity tests." Pet. App. 146a.[2] The Court, however, stated that it would "give defendant the the benefit of the doubt on underrepresentation" prong in order to address the issue about whether there was a systematic exclusion. Pet. App. 147a.[3]

Nevertheless, in the Court's analysis of the third prong of *Duren*, the Court returned to the issue of the magnitude of the disparity in rejecting the claim that there was systematic exclusion:

> [W]hile defendant's proof may satisfy any duration requirement, the disparities over that time fell far short of those in *Duren*. *Defendant did not demonstrate unfair and unreasonable underrepresentation under the disparity analyses.* We therefore conclude that defendant has not shown a systematic exclusion of African-

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[2] *Smith*, 615 N.W.2d at 4.

[3] *Smith*, 615 N.W.2d at 4-5.

> Americans for the Kent County Circuit Court jury pool. [Pet. App. 148a-149a.][4]

The gravamen of this analysis is that Smith failed to show any legally-significant disparity.

The Court noted that there were three different tests that had been used by the federal courts for evaluating whether there was a fair and reasonable representation from the community: the absolute disparity test, comparative disparity test, and the standard deviation system of analysis. Pet. App. 145a-146a.[5]

On this issue of whether there was systematic underrepresentation, the Court agreed with the analysis of the concurring opinion. The concurrence rejected the claim of systematic exclusion and addressed the two possible sources of the reduced number of African Americans, which were the "siphoning" issue and the disparate impact of the processes on African Americans. The concurrence concluded that Smith had failed to carry his burden because he had "not shown" how the alleged siphoning of prospective jurors to the city misdemeanor district courts changed the percentage of African Americans available for service in the felony circuit court. Pet. App. 168a.[6]

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[4] *Smith*, 615 N.W.2d at 7 (emphasis added).

[5] *Smith*, 615 N.W.2d at 2-3. The standard deviation system of analysis measures the disparity between the percentages in the population and in the qualified pool that would result as a matter of random chance. *Ramseur v. Beyer*, 983 F.2d 1215, 123 (3d Cir. 1992). See also *United States v. Rioux*, 97 F.3d 651, 655 (2d Cir. 1996).

[6] *Smith*, 615 N.W.2d at 12.

Also, the concurrence addressed the points raised that the county should have anticipated the processes it employed for drawing in jurors would yield a smaller number of African Americans than were in the community. Specifically, Smith argued that there would be more questionnaires that were undeliverable in an area with a large minority population; that minorities would be less likely to return questionnaires; and that the excuses for personal reasons like transportation or lack of child care would more often apply to minorities. Pet. App.169a-170a.[7]

In response, the concurrence reasoned that the dynamic that would lead to fewer African American responding were not due "to the system itself" but were the result of "outside forces." The county, the concurrence determined, was not required to "affirmatively counteract outside forces" where the processes it employed were facially neutral. Pet. App. 171a.[8]

The Michigan Supreme Court majority expressly agreed with the analysis of the concurrence on the siphoning and on the influence of social and economic factors on juror participation. Pet. App. 147a.[9]

3. The Habeas Review in Federal Court

On habeas review, the federal magistrate entered a report and recommendation that recommended that the writ for habeas corpus be denied. Pet. App. 142a. The district court adopted this recommendation. Pet. App. 39a.

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[7] *Smith*, 615 N.W.2d at 12.

[8] *Smith*, 615 N.W.2d at 4.

[9] *Smith*, 615 N.W.2d at 6.

On appeal, the Sixth Circuit reversed. The Sixth Circuit noted that the Michigan Supreme Court had "rejected the disparities as constitutionally insignificant." Pet. App. 18a.[10] The Sixth Circuit then relied on the fact that there was a comparative disparity of 18% for African Americans in the venires as against in the community for the six months preceding the trial. Pet. App. 9a.[11] And the Court noted that the comparative disparity for the month in which the jury was selected was 34%. Pet. App. 9a.[12] Even though this Court used an absolute disparity test in *Duren*, the Sixth Circuit then determined that the Michigan Supreme Court was "unreasonable" in its reliance on the absolute disparity test in its finding that the disparities were not constitutionally significant.

The Sixth Circuit then determined that the disparity was systematic and was therefore a violation of the Sixth Amendment. The Sixth Circuit rejected the analysis of the Michigan Supreme Court on the issue of the social and economic factors by concluding that the "particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel." Pet. App. 28a.[13] Consequently, because these

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[10] *Berghuis*, 543 F.3d at 337. See also *Berghuis*, 543 F.3d at 338 ("The Michigan Supreme Court found [Smith's] figures did not demonstrate that African Americans were significantly underrepresented").

[11] *Berghuis*, 543 F.3d at 332. This percentage is computed by evaluating the ratio of the expected jurors, 68, as compared to the actual jurors, 56, by dividing the difference between them (12) by 68.

[12] *Berghuis*, 543 F.3d at 332. The numbers from the specific report for this period compared 11.5 expected jurors in the venire as against 7.5 that was estimated to be actually present, determining that there was an underrepresentation of 34.8% for that month. Pet. App. 218a. This percentage is computed evaluating the ratio of expected jurors of 11.5 against the actual jurors, 7.5, by dividing the difference (4) by 11.5.

[13] *Berghuis*, 543 F.3d at 341.

factors impact the number of African Americans in Kent County, the Sixth Circuit found that the opportunity to be excused from service based on child care, transportation, or work considerations are "inherent" in the jury process. Pet. App. 29a.[14] The Sixth Circuit determined that the State had rebutted this prima facie showing under *Duren* because the there was a significant interest advanced by this exemption criteria based on the possible hardships that would otherwise be imposed on jurors. Pet. App. 35a.[15]

But the Sixth Circuit concluded that the other source of disparity – the siphoning of prospective jurors to the city misdemeanor district courts – was not justified. The Michigan Supreme Court had found that Smith had failed to carry his evidentiary proofs for the "siphoning" claim. In response, the Sixth Circuit noted that there was no obligation to provide the "precise numbers" but that "proof must be sufficient to support an inference that a particular process results in the underrepresentation of a distinctive group." Pet. App. 30a.[16]

REASONS FOR GRANTING THE PETITION

There are three reasons that this Court should grant this petition for review.

First, there is a split of authority of authority among the circuits about whether this kind of small disparity between the population of the distinct group within the community and the venire constitutes a violation of the Sixth Amendment. The majority of other circuits (First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh), relying on *Duren v.*

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[14] *Berghuis,* 543 F.3d at 342.

[15] *Berghuis,* 543 F.3d at 345.

[16] *Berghuis,* 543 F.3d at 342.

Missouri, have relied on the absolute disparity standard and rejected the claim that the kind of small disparity at issue here could constitute a violation. Several of the circuits (First, Second, Eighth, and Ninth) in fact have expressly rejected the comparative disparity standard applied here.

Second, the disagreement among the circuits on the issue about what standard to apply in evaluating if there is an underrepresentation of the distinct group evidences the point that there is no clearly established Supreme Court precedent on this point. The AEDPA statute, 28 U.S.C. § 2254(d), requires that the State court's decision be an unreasonable application of *clearly established* Supreme Court precedent. The fact that this Court did not apply the comparative disparity test in *Duren* and that several circuits have expressly rejected the comparative disparity test makes it apparent that this standard was not clearly established by the Supreme Court. The Sixth Circuit failed to honor the deference accorded to decisions of the State courts and misapplied the AEDPA.

Third, the decision was wrong. There was no systematic underrepresentation of African American jurors in this case. The county employed a neutral instrument for drawing in jurors from the community, and the absolute disparity during the six-month time period examined was only 1.28%. Moreover, the county's decision to allow prospective jurors to claim a hardship to avoid service was a reasonable exemption and was not a mechanism inherent in the process for systematically excluding African American jurors. The Sixth Circuit also failed to accord the presumption of correctness regarding the State court's factual findings about Smith's failure to show that the system of allowing jurors to serve in local courts significantly affected the number of African American jurors available for service.

1. The decision of the Sixth Circuit creates a conflict among the circuits on the issue of the fair cross section of the community under *Duren*.

The claim raised by Smith implicated his Sixth Amendment right to be tried before a jury that was drawn from a "fair cross section of the community."[17] Although a defendant is not entitled to a jury of any particular composition, this Court has noted that the panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative of the community.[18]

On this basis, this Court held in *Duren* that the defendant must show that a distinctive group is underrepresented in venires due to systematic exclusion of that group in the jury-selection process. The prima facie case requires proof of three things:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show
>
> (1) that the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

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[17] *Taylor v. Louisiana*, 419 U.S. 522, 526, 530 (1975).

[18] *Taylor*, 419 U.S. at 538.

> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[19]

In applying this second prong, this Court in *Duren* compared the percentage of persons from the distinct group in the venire with the percentage of the persons in the community. At issue in *Duren* was the percentage of women from the community as against the numbers of women within the venires. This Court concluded that there was a "gross discrepancy" because women comprised a little more than half of the community but only 15% of the venires.[20] This comparison of the absolute percentages has been termed the absolute disparity test.

In the present case, during the time period from April 1993 to October 1993, there were 56 African American prospective jurors in the venires out of 929 persons, which is 6% of the total. Since 7.28% of the adults in the county were African American, there was an absolute disparity of 1.28% during the time period examined. The Sixth Circuit noted that using the absolute disparity test, the disparity was "negligible." Pet. App. 19a.[21] The Sixth Circuit went on, however, and evaluated these numbers using the comparative disparity standard, which compares the diminished likelihood that the distinct group would be called for jury service, which generally is calculated by dividing the absolute disparity by the percentage of population for the distinct group. In this view, the comparative disparity during the six month time

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[19] *Duren*, 439 U.S. at 364.

[20] *Duren*, 439 U.S. at 366.

[21] *Berghuis*, 543 F.3d at 337.

period was 18% and for the month in which the jurors for this particular trial were drawn was 34%. Pet. App. 21a.[22]

In evaluating this second prong, there are at least nine circuits that have examined the same kind of disparities at issue and rejected the claim that the disparity violated the defendant's right to be tried by a jury drawn from a fair cross section of the community. The Sixth Circuit's decision here conflicts with the other circuits.

A survey of the circuits bears this point out.

In the First Circuit, the Court determined in *United States v. Royal* that a disparity between 4.86% of African Americans in the population and 1.89% of the prospective jurors was inadequate for a prima facie showing under *Duren.*[23] In *United States v. Hafen,* an earlier First Circuit decision, the Court examined a disparity between 3.73% in the community and 1.714% in the jury pool for African Americans and found that the resulting 2.02% absolute disparity was not constitutionally significant.[24]

Importantly, the First Circuit in *Hafen* expressly criticized the use of the comparative disparity test when the group allegedly underrepresented is "a very small proportion of the total population."[25] The comparative disparity at issue there – 54% – was higher than the one the Sixth Circuit relied on here – 34%. The First Circuit noted that the problem with the comparative disparity test is that it "distorts" the reality because such a small change

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[22] See *Berghuis,* 543 F.3d at 338.

[23] *United States v. Royal,* 174 F.3d 1, 27 (1st Cir. 1999).

[24] *United States v. Hafen.* 726 F.2d 21, 24 (1st Cir. 1984).

[25] *Hafen,* 726 F.2d at 24.

in percentage yields a very large comparative percentage. The Court noted that if there were only a single member of a distinct group in the community and that person was not selected as a prospective juror, the absolute percentage difference might be tiny while the comparative disparity would be 100%.[26]

In the Second Circuit, the Court in *United States v. Rioux* rejected a claim of underrepresentation for both African Americans and Latinos under the Sixth Amendment.[27] The adult population of African Americans and Latinos was 7.08% and 4.24%, while the grand jury was composed of only 5.0% and 2.10%. The absolute disparity for each was 2.08% and 2.14%. Although not calculated by the Second Circuit, the comparative disparities would be similar to or larger than the disparities at issue here. The Court determined that the numbers were "statistically and constitutionally insignificant even when dealing with smaller jury pools" and found there was no unfair representation.

In reaching this decision, the Second Circuit in *Rioux* noted that it had previously refused to employ the comparative disparity test.[28] In this previous case, *United States v. Jenkins,* the Second Circuit articulated a similar point as the one noted in *Hafen* that a comparison of the changes in percentages would exaggerate the effect, describing that if the distinct group comprised 1% of the population but only one quarter were registered, that it would create a 4 to 1 disparity.[29]

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[26] *Hafen*, 726 F.2d at 24.

[27] *Rioux*, 97 F.3d at 657.

[28] *Rioux*, 97 F.3d at 655, citing *United States v. Jenkins*, 496 F.2d 57, 65-66 (2d Cir. 1974).

[29] *Jenkins*, 496 F.2d at 65.

In the Third Circuit, the Court in *United States v. Weaver* examined a Sixth Amendment claim under *Duren* where the absolute disparity for the percentages of African Americans and Latinos were 1.23% and 0.71%, but the comparative disparity was 40.01% and 72.98% for each group, both of which are higher than the comparative disparity found here.[30] The Court then noted that the comparative disparity figures were of "questionable" probative value and determined that the results of the analysis under these two methods did not support the defendant's challenge.[31]

In the Fifth Circuit, the Court in *United States v. Butler* determined that absolute disparities of 9.14% and lower did not establish a prima facie case because they were not as high as 10%, which this Court had used as a benchmark in its decision in *Swain v. Alabama,* which examined the juror exclusion under the Equal Protection Clause.[32]

In the Seventh Circuit, the Court determined in *United States v. Ashley* that a discrepancy between 3% and 0% was not constitutionally significant because "a discrepancy of less than ten percent is not enough to demonstrate unfair or unreasonable representation" of the community in the venires.[33]

In the Eighth Circuit in *United States v. Rogers*, the Court examined a disparity between 1.87% African

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[30] *United States v. Weaver,* 267 F.3d 231, 241 (3d Cir. 2001).

[31] *Weaver,* 267 F.3d at 243.

[32] *United States v. Butler,* 611 F.2d 1066, 1070 (5th Cir. 1980), citing *Swain v. Alabama,* 380 U.S. 202 (1965).

[33] *United States v. Ashley,* 54 F.3d 311, 314 (7th Cir. 1995).

Americans in the population and 1.29% in the jury pools.[34] The Eighth Circuit was constrained to follow the prior holding of an earlier decision of the Eighth Circuit in *United States v. Clifford*, which had rejected the comparative disparity method.[35] The Eighth Circuit asked the entire circuit to reconsider the decision but affirmed the defendant's conviction in that case despite the comparative disparity.[36] The rest of the circuit thereafter declined the invitation.[37]

In the Ninth Circuit, the Court in *United States v. Sanchez-Lopez* determined that a disparity for Latinos between 3.87% of Latinos in the general population against 1.82% from the master jury wheel did not constitute a prima facie violation of *Duren*.[38] The Court noted the higher comparative disparity, but rejected this analysis as "exaggerated."[39] The Court therefore denied the defendant any relief.

In the Tenth Circuit, in *United States v. Orange*, the Court comparative disparities of between 35% and 55% were insufficient to establish a prima facie case that African Americans, Native Americans, Asian Americans,

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[34] *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996).

[35] *Rogers*, 73 F.3d at 777, citing *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981), and stating that "our court has declined to adopt the comparative disparity concept as a better means of calculating underrepresentation."

[36] *Rogers*, 73 F.3d at 778.

[37] *Rogers*, 73 F.3d 774 at 779.

[38] *United States v.Sanchez-Lopez*, 879 F.2d 541, 548-549 (9th Cir. 1989).

[39] *Sanchez-Lopez*, 879 F.2d at 547-548. See also *Thomas v. Borg*, 159 F.3d 1147, 1150 (9th Cir. 1998)(rejecting the use of the comparative disparity test in habeas).

and Latino Americans were underrepresented,[40] despite the fact that these groups were less than 10% of the voting age population.[41] The Court rejected any relief for the defendant.

Finally, in the Eleventh Circuit, in *United States v. Carmichael*, released on March 5, 2009, the Eleventh Circuit rejected a claim that there was an underrepresentation of African American eligible for juror service. The defendant claimed that 30.466% of the adult population were African American and the United States claimed that the number was only 20.74%.[42] The Eleventh Circuit concluded that there was no showing of underrepresentation because the defendant failed to show an absolute disparity of more than 10%, which the Eleventh Circuit stated defendant was required to do in order to establish the second element of *Duren*.[43]

The point is an obvious one that in all of these circuits, Smith's claim would have been rejected under the second prong of *Duren*. Thus, if the Sixth Circuit decision is allowed to stand, the issue whether there is a constitutional violation of a person's right to fair cross section of the community depends on where one lives. The four States in the Midwestern part of the United States are governed by a standard that is different from the rest

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[40] *United States v. Orange*, 447 F.3d 792, 798-799 (10th Cir. 2006).

[41] *Orange*, 447 F.3d at 799.

[42] *United States v. Carmichael*, 560 F.3d 1270, ___ *22 (11th Cir. 2009).

[43] *Carmichael*, F.3d at __ *20 ("'[i]f the absolute disparity between these two percentages is ten percent or less, the second element is not satisfied'"), quoting *United States v. Grisham*, 63 F.3d 1074, 1078-1079 (11th Cir. 1995). See also *United States v. Clarke*, ___ F.3d ___; 2009 U.S. App. LEXIS 6169 (11th Cir. 2009), released on March 20, 2009.

of the country. Consistent with Supreme Court Rule 10(a), this Court should grant this petition.

2. The Sixth Circuit here applied a standard – the comparative disparity standard – that is not clearly established precedent from the Supreme Court under 28 U.S.C. § 2254.

In providing a survey of the other nine circuits that have examined the question of the whether there is a fair representation of the community for the prospective jurors, it is significant that all of the cases cited in the text were on direct review. In other words, Smith's case would have been rejected by the other circuits if his claims had been advanced on *direct* review. The fact that all of the other circuits have rejected similar claims, and that several of them specifically rejected the comparative disparity standard, demonstrates that this test is not clearly established. Moreover, this Court applied the absolute disparity test in *Duren*.

The reality here is that the Sixth Circuit has adopted the comparative disparity standard for the circuit, which is one of the tests that has been explored in the other circuits but not applied in justifying a finding of a violation of *Duren*. This appears to be the first time a circuit has applied the standard and found a violation. But this is not the role of a federal court in habeas review. It is not to make new law.

The form of relief contemplated AEDPA is limited. Under 28 U.S.C. § 2254(d)(1), relief can only be granted with respect to any State claim adjudicated on the merits if the State adjudication was contrary to or an unreasonable application of clearly established Supreme Court precedent. And the decision regarding what constitutes "clearly established" Supreme Court precedent is derived from the holdings of the Supreme Court at the

time of the relevant State adjudication, rather than from obiter dictum.[44] In the last few years, this Court has reiterated the point that the rule must be one that was specifically established by this Court.

In *Wright v. Van Patten,* this Court examined the question whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.[45] The State courts had denied relief, but the Seventh Circuit determined this was a structural error under *United States v. Cronic* and granted habeas relief.[46] This Court reversed because there was no established Supreme Court precedent on this point – "No decision of this Court, however, squarely addresses the issue in this case."[47] *Wright* required that there be a "clear[] hold[ing]" from this Court on the question at issue.[48]

Such is the case here. The claim raised by Smith implicated his Sixth Amendment right to be tried before a jury that was drawn from a "fair cross section of the community."[49] The seminal case for the standard for evaluating the issue is this Court's decision in *Duren.* But there is no case law from this Court that delineates by what standard a lower court must determine under the second prong whether the representation is not fair and reasonable. This is the paramount point.

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[44] *Williams v. Taylor,* 529 U.S. 362, 412 (2000).

[45] *Wright v. Van Patten,* 128 S.Ct. 743, 744 (2008).

[46] *Wright,* 128 S.Ct. at 745, citing *United States v. Cronic,* 466 U.S. 648 (1984).

[47] *Wright,* 128 S.Ct. at 746.

[48] *Wright,* 128 S.Ct. at 746. See also *Carey v. Musladin,* 549 U.S. 70 (2006).

[49] *Taylor,* 419 U.S. at 526, 530.

In *Duren,* this Court applied what other courts have termed the "absolute disparity" test to determine whether there was an unfair underrepresentation of women.[50] There was no suggestion that there were other possible formulas that must be employed by the lower courts to determine whether there was an underrepresentation. Nor did this Court identify percentage ranges that would establish underrepresentation.

In response to the *Duren* decision, the lower federal courts have applied three different standards to determine whether there is an unreasonable representation of a distinct group: (1) the absolute-disparity standard; (2) the comparative-disparity standard; and (3) the standard-deviation method.[51] The Michigan Supreme Court decided to consider all three approaches, determining that it would apply no individual method to the exclusion of the others. But there was no obligation from this Court for it to do so.

The Sixth Circuit here ignored the fact that there is no clearly established Supreme Court precedent, and examined the issue as if on direct review. The Sixth Circuit noted the different methods, examined the virtues of the systems, and then determined that the comparative disparity system of analysis was the better methodology for circumstances in which the group underrepresented is small. Pet. App. 20a.[52] The comparative-disparity standard is new to the Sixth Circuit. Indeed, the Sixth Circuit candidly acknowledged that this Court did not require this standard:

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[50] *Duren,* 439 U.S. at 365 n 23.

[51] *Ramseur v. Beyer,* 983 F.2d 1215, 1231 (3d Cir. 1992).

[52] *Berghuis,* 543 F.3d at 337 (citation omitted).

> [I]n the years since *Duren*, the [Supreme] Court has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges. [Pet. App. 18a.][53]

This is a concession that there is no clearly established Supreme Court precedent on this point. The Sixth Circuit's analysis was clear that it was adopting this standard for the first time.

In attempting to explain why the Michigan Supreme Court's application was an "erroneous" application of clearly established law, the Sixth Circuit cited two decision from other circuits, *United States v. Rogers*,[54] and *Ramseur v. Beyer*,[55] because the comparative disparity in those cases was over 30% and 40%, similar to the comparative disparity here (which was 34% for the month at issue). But this analysis failed to acknowledge that this methodology was not established by this Court, that other circuits (First, Second, Eighth, and Ninth) had rejected the comparative-disparity methodology; and that this was not even the prevailing rule within the Sixth Circuit until this case.[56]

This is a classic case of mere disagreement. A State court's decision is not unreasonable simply because the court in habeas review concludes in its independent judgment that the State court's decision applied clearly established federal law erroneously or incorrectly; the State court's application must also be objectively

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[53] *Berghuis*, 543 F.3d at 337.

[54] *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996).

[55] *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992).

[56] See, e.g., *United States v. Forest*, 355 F.3d 942, 954 (6th Cir. 2004); *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988).

unreasonable.[57] More importantly, the relevant law is *clearly established* Supreme Court precedent. There was no such guidance here on these questions. As this Court's stated in *Van Patten,* the question about which standard to apply for evaluating the second prong of *Duren* is an unresolved issue for this Court. The Sixth Circuit's decision here was not supported in law.

Moreover, the two cases cited by the Sixth Circuit do not support its decision. In *Ramseur,* the Third Circuit found no violation despite the 40% comparative disparity.[58] The Sixth Circuit's reference inaccurately stated the holding of *United State v. Rogers.* The Sixth Circuit cited *Rogers* for the proposition that the court there made a "finding [that] disparity of over 30 percent [met] the underrepresentation prong of the *Duren* prima facie test where African Americans comprised only 1.87 percent of the jury-eligible population." Pet. App. 21a.[59] But the ultimate holding was just *the opposite.* The Eighth Circuit was constrained to follow the prior holding of an earlier panel of the Eighth Circuit, which rejected the comparative-disparity method in *United States v. Clifford.*[60] Consequently, the Eighth Circuit asked the entire circuit to reconsider the decision but it nevertheless affirmed the defendant's conviction in that case despite

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[57] *Williams,* 529 U.S. at 410.

[58] *Ramseur,* 983 F.2d at 1232 ("[W]e conclude that the studies conducted here, which do not reflect substantial underrepresentation over a significant period of time, also do not satisfy *Duren's* fair cross-section analysis").

[59] *Berghuis,* 543 F.3d at 338.

[60] *Rogers,* 73 F.3d at 777, citing *Clifford,* 640 F.2d 150, 155 (8th Cir. 1981), and stating that "our court has declined to adopt the comparative disparity concept as a better means of calculating underrepresentation."

the comparative disparity.[61] The error of the Sixth Circuit on this point was significant because it was the only case with a similar percentage of comparative disparity cited by the Court to justify its conclusion that the decision of the State court was erroneous.

The action here by the Sixth Circuit also is not an isolated failure to accord a State court decision the proper deference under AEDPA. The State is seeking certiorari in three other cases, all published, all murders, in which it contends that the Sixth Circuit failed to properly apply the AEDPA standard.[62]

3. The decision of the Sixth Circuit was also wrong on the merits – there was no significant underrepresentation and no systematic exclusion of African Americans from juries in Kent County, Michigan.

Even in reaching the merits of the issue, the analysis of the Sixth Circuit on the second and third prong of *Duren* is problematic and if applied may call into question the constitutionality of ordinary processes used by the State to draw in jurors for service.

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[61] *Rogers*, 73 F.3d at 778.

[62] See *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008)(the Sixth Circuit rejected the State court's determination that there was no prejudice on the claim of ineffective assistance of counsel because alibi testimony is always a jury question); *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008)(the Sixth Circuit determined that there was a violation of *Miranda* where the police continued to interview the defendant where the defendant acknowledged his rights but did not expressly waive them); and *Newman v. Metrish*, 543 F.3d 793 (2008)(the Sixth Circuit determined that there was insufficient evidence even though there was compelling circumstantial evidence of defendant's guilt including evidence linking him to the murder weapons).

Regarding the second prong of *Duren*, the standard that the Sixth Circuit has adopted – the comparative disparity test – does not effectively measure whether there was unconstitutional underrepresentation. The problem with this standard is that it magnifies the significance of small variations for a distinct group who comprises a small percentage of the community. Several circuits have noted this same point.[63] There may be numerous explanations that explain why the distinct group has smaller numbers in the venires than the adult census population that are not inherent in the processes used by the State to draw in prospective jurors.

But the only way to then rectify these small variations will be to specifically select prospective jurors – based on their racial or ethnic identity – to ensure that there is a corresponding proportionate representation. In the name of creating an exactly proportionate juror system, the State will be required to match as a quota the percentage for every distinct group, because it will need to ensure that it will not be subject to a comparative disparity challenge. In other words, the State will have to know the ethnic or racial identity of every person on the juror list to then ensure that the overall percentages of this list match the percentages within the adult community. This is an untenable process. It also is not constitutionally required.

Consider the numbers at issue here. According to the statistician who evaluated the numbers from the six month period April 1993 through October 1993, there were 929 prospective jurors and, based on the adult census for African Americans in Kent County (7.28%), there should have been 68 African American jurors, but there were 56 according to the expert's analysis, which is 6%. Pet. App.

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[63] See, e.g., *Hafen*, 726 F.2d at 24; and *Jenkins*, 496 F2d at 65.

160a. Thus, there were twelve fewer African American prospective jurors over six months, an average of two fewer African Americans in each venire than one would have expected based on the census population. This 1.28% absolute disparity then can be measured as an exaggerated 18% comparative disparity when comparing the relative percentages. The smaller the numbers at issue, the larger that a deviation will appear to be.

Although it was not a basis for the Sixth Circuit's analysis, the instrument used from which to draw the prospective jurors itself might not have captured the full numbers of an African Americans or other distinct groups. Kent County relied on driver's licenses and driver identifications from which to draw the names of prospective jurors. There may be some distinct groups in Michigan, particularly relatively new ethnic immigrants, who are less likely to obtain driver's licenses or State identifications. The same may be true for other jurisdictions in Michigan or other States that rely on the list of registered voters for obtaining names of prospective jurors.[64] Where there is an insular ethnic group that does not register to vote in the same numbers as the rest of the community, this otherwise neutral instrument would then be subject to a challenge based on the comparative disparity test.[65]

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[64] See *United States v. Biaggi*, 909 F.2d 662, 678 (2d Cir. 1990)(rejecting a challenge under *Duren* even though there was a disparity where the prospective jurors were drawn from the voter registration lists).

[65] The same is true for the requirement under Michigan law that the prospective juror be "conversant with the English language." See Mich. Comp. Laws § 600.1307(1)(b). This facially-neutral requirement, which is a common-sense precondition for jury service, might also have the effect of reducing the numbers of certain distinct groups if they are new immigrants.

In *Duren*, this Court did not specify how the absolute disparity test was to be applied. Given that the right relates to the objective measure of the cross section of the community, for future cases, including habeas, this Court should specify that a defendant should be required to prove an absolute disparity of 10% – which is currently the standard employed by the Fifth, Seventh, and Eleventh Circuits – in order to establish a prima facie case of failing to draw from a fair and reasonable representation of the community.[66] If the absolute disparity is less than 10%, a defendant fails to demonstrate a violation of the second prong of the *Duren* test for measuring underrepresentation. For all fair cross section cases, including distinct groups that comprise a small percentage of the population, Equal Protection safeguards remain to protect against constitutionally infirm jury selection processes under *Castaneda v. Partida*.[67] Where the State has selected a neutral, reasonable means of selecting a prospective jury – here the use of driver's licenses and identification cards – there would be no prima facie showing of a violation of Sixth Amendment under the second prong of *Duren*, unless the deviation surpassed 10%.

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[66] See *Butler*, 611 F.2d at 1070 (Fifth Circuit); *Ashley*, 54 F.3d at 314 (Seventh Circuit); and *Carmichael*, 560 F.3d at ___ *20 (Eleventh Circuit). This Court's analysis in *Swain*, 380 U.S. at 209 (insufficient showing that an "identifiable group in a community is underrepresented by as much as 10%").

[67] *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)(establish a three-part test for a prima facie case of jury discrimination amounting to a denial of equal protection: [1] a distinct group; [2] that is substantially underrepresented; and [3] a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing).

Regarding the third prong of *Duren,* Smith challenged the Kent County system as systematic underrepresentation, claiming that there were as many as four ways in which the process did not adequately capture the prospective African American jurors: (1) the return to senders that the Michigan county received when it sent out the questionnaires to the jurors; (2) the rate that the recipients of this inquiry did not respond; (3) the number of jurors for whom service in a jury would present a hardship because of child care, transportation, or work considerations; and (4) the use of the jurors in local courts for city misdemeanors before the jurors were drawn into felony circuit court.

In its analysis of the third prong of *Duren* – whether underrepresentation is due to systematic exclusion of a distinct group – the Sixth Circuit focused on two of Smith's claims, the claims of excuses for hardship and the "siphoning" of prospective jurors to the local courts for city misdemeanors.

In rejecting the Michigan Supreme Court's findings and concluding that it had unreasonably applied clearly established Supreme Court precedent regarding the excuses, the Sixth Circuit erred by imposing a new federal requirement, where none existed previously, in determining that Smith had established the prima facie case of systematic exclusion based on the hardship excusals.

This Court specifically acknowledged in *Duren* that there may be reasonable exemptions for hardships or incapacity.[68] It counseled that there may be "occupational" exemptions, but that "any category expressly limited to a group in the community of sufficient magnitude and

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[68] *Duren,* 439 U.S. at 370, citing *Taylor v. Louisiana,* 419 U.S. at 534.

distinctiveness" might constitute a prima facie violation of the fair cross section requirement.[69] The circuits have not apparently found a violation based on excuses for hardship.[70]

Rather, the systematic exclusion must be "inherent in the particular jury-selection process utilized."[71] Nevertheless, in examining the excusal provision for hardships, the Sixth Circuit determined that the hardship excusals established a prima facie violation of *Duren*:

> [B]ecause [the] social or economic factors disproportionately impact African Americans in Kent County, such factors produced systematic exclusion within the meaning of *Duren* inasmuch as they are "inherent in the particular jury selection process utilized."[72]

In reaching this conclusion, the Sixth Circuit ignored the AEDPA standards and contrived a novel constitutional requirement.

The Michigan county's facially-neutral allowance of hardship excusals involves external forces — much like the findings of other circuits that the failure to follow up on unreturned juror questionnaires involves private

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[69] *Duren*, 439 U.S. at 370.

[70] See, e.g., *McGinnis v. Johnson*, 181 F.3d 686, 691 n 6 (5th Cir. 1999) ("We have found no cases that examine the appropriate use of statistical analysis in the context of a facially neutral excusal provision, under which jurors voluntarily decide whether to seek an excuse from jury service").

[71] *Duren*, 439 U.S. at 366.

[72] *Berghuis*, 543 F.3d at 340.

external forces and is not systematic exclusion.[73] In the questionnaire example, a prospective juror either elects not to return the questionnaire or some other factor prevents its return. Compare a prospective juror who demonstrates a hardship and is excused. Both are the result of self-elimination or other external forces not created by the process instituted by the Michigan county.

In contrast, two examples of true systematic exclusion from other circuits are illustrative of the point. In *United States v. Jackman*, there was an unintended computer error that excluded people who resided in two populous counties from which juries were drawn – counties with a large proportion of racial and ethnic minorities.[74] The Second Circuit concluded that the underrepresentation was "inherent in the particular jury-selection process utilized."[75] Also, in *Gibson v. Zant*, a panel of jury commissioners was required to "compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors."[76] The Eleventh Circuit concluded that the criteria were so subjective ("easily manipulated") to enable the commissioners to cause the underrepresentation of African Americans and women.[77] The circumstances here relate to factors outside of the processes themselves in contrast to the outright exclusion of *Jackman* or the subjective criteria in *Gibson*.

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[73] See, e.g., *Orange*, 447 F.3d at, 800; *Randolph v. California*, 380 F.3d 1133, 1141 (9th Cir. 2004); and *Rioux*, 97 F.3d at 658.

[74] *United States v. Jackman*, 46 F.3d 1240, 1242-43 (2nd Cir. 1995).

[75] *Jackman*, 46 F.3d at 1248, citing *Duren*, 439 U.S. at 366.

[76] *Gibson v. Zant*, 705 F.2d 1543, 1547 (11th Cir. 1983).

[77] *Gibson*, 705 F.2d at 1549.

In concluding that the social and economic influences were inherent in the Michigan county process, the Sixth Circuit wrongly determined that the hardship excusals somehow qualified as a "criteria."[78] The use of hardship to allow prospective jurors to excuse themselves from service are not distinguishable from the circumstance in which the failure to return a questionnaire will relieve a person from juror service. The Sixth Circuit indicated that the social and economic factors were "non-random," from which there may be an "inference of systematic exclusion."[79]

This analysis is wrong because these provisions apply equally to everyone. The Sixth Circuit suggests that there may be some underlying animus on the part of the Michigan county, which is without any support in the record below. To the contrary, there is no category or group identified by the provision: it is facially neutral and is consistent with the reasonable exemptions identified by this Court in *Duren*. Without this provision, many jurors – whether members of a distinct group or not – would face a Hobson's choice: either appear for jury duty in the face of neglecting their children or losing their jobs or disregard their jury service and ultimately face a hearing for contempt for failing to appear.[80]

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[78] *Berghuis*, 543 F.3d at 341 n 4, distinguishing the Michigan Supreme Court's citation to *United States v. Purdy*, 946 F.Supp. 1094, 1104 (D. Conn. 1996).

[79] *Berghuis*, 543 F.3d at 341.

[80] The Sixth Circuit ultimately found that the prima facie violation for the Kent County provision for hardships had been rebutted by the State because of the "significant interest" in avoiding these burden on jurors, see *Berghuis*, 543 F.3d at 345, but the State of Michigan contends that these considerations were not inherent in the process and there was no prima facie showing of a Sixth Amendment violation. The Michigan Supreme Court did not fail to apply "clearly established" Supreme Court precedent.

Moreover, the Sixth Circuit's finding of a factual and legal nexus between the alleged "siphoning" of African Americans stands in stark contrast to the Michigan Supreme Court's factual analysis:

> The record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool. Defendant has simply failed to carry his burden of proof in this regard.[81]

This factual determination was underscored by the point that the concurring opinion in the Michigan Supreme Court noted that after Kent County discontinued this practice of allowing prospective jurors to be first selected by local courts, the change in the number of African Americans available in State circuit court was "small." Pet. App. 169a.[82] This was based on a statement in the dissenting opinion from the Michigan Court of Appeals, which noted that "in the year after defendant's jury was chosen, no statistically significant change occurred when the system stopped 'draining' the largest concentration of African Americans from the master jury list by first selecting district court jurors." Pet. App. 203a.

In rejecting this factual analysis, the Sixth Circuit effectively usurped the role of the State judiciary. Under the AEDPA, 28 U.S.C. § 2254(e), the factual findings of the State courts are presumed to be correct. On this factual point, the Sixth Circuit relied on testimony from two witnesses from the State evidentiary hearing that did not include any concrete data regarding the numerical effect of

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[81] *Smith*, 615 N.W.2d at 6.

[82] *Smith*, 615 N.W 2d at 12 n 15.

this process.[83] Because 85% of the African American population resided in Grand Rapids, the Sixth Circuit then found that this diversion process to the local Grand Rapid courts "essentially omits" the African American jurors. Pet. App. 33.[84] But in the absence of direct evidence to rebut the factual conclusion of the Michigan courts that the "siphoning" did not significantly affect the number of African Americans in the venires because of the evidence of jurors the following year after this practice ceased, the Sixth Circuit was foreclosed under 28 U.S.C. § 2254(e) from making this finding.

The Sixth Circuit's rejection of the Michigan Supreme Court's factual conclusions and the substitution of its own factual inferences regarding the evidence is at odds with the statutory presumption of correctness accorded State courts' factual findings.[85] By not according the Michigan Supreme Court finding the presumption of correctness under AEDPA, the Sixth Circuit failed to perform the proper review in habeas. In the end, the Sixth Circuit functioned as if sitting in direct review, thereby invading the province of the State courts.

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[83] *Berghuis*, 543 F.3d at 342, quoting Richard Hillary, director of the Defender's Office, who said that he "routinely observed few" African Americans on Kent County venire panels and that the Jury Minority Representation Committee had "studied" the matter and found that it was caused by losing minorities to the local courts; and Kim Foster, the Kent County Court Administrator, who said that the system was revised based on "the belief" that the local courts had "swallowed up" the African American jurors.

[84] *Berghuis*, 543 F.3d at 343.

[85] *Berghuis*, 543 F.3d at 342.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Attorneys for Petitioner

Dated: May 2009

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DIAPOLIS SMITH,

Petitioner-Appellant

No. 06-1463

v.

MARY BERGHUIS, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 03-00087—Gordon J. Quist, District Judge.

Argued: Apr 23, 2008

Decided and Filed: September 24, 2008

Before: MOORE and CLAY, Circuit Judges;
SCHWARZER, Senior District Judge.*

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* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

ARGUED: James Sterling Lawrence, Royal Oak, Michigan, for Appellant. Debra M. Gagliardi, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.
ON BRIEF: James Sterling Lawrence, Royal Oak, Michigan, for Appellant. Brian 0. Neill, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

CLAY, Circuit Judge. Petitioner, Diapolis Smith, was convicted of second degree murder and felony possession of a firearm and sentenced to life imprisonment in a Michigan state court. After exhausting his state court remedies, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Michigan, which was denied. Petitioner now appeals from the order entered by the district court denying his petition for a writ of habeas corpus. Specifically, Petitioner contends that he was denied an impartial jury drawn from a fair cross-section of the community in violation of the Sixth Amendment and that he received ineffective assistance of counsel at trial and during sentencing. We find that Petitioner has demonstrated a violation of his Sixth Amendment right to a jury drawn from a fair cross-section of the community and therefore we need not address his ineffective assistance of counsel claims. For the reasons that follow, we **REVERSE** the judgment of the district court with respect to Petitioner's Sixth Amendment claim that his jury was not drawn from a fair cross-section of the community and **REMAND** the case with instructions that the

district court order Smith's release from state custody unless the state of Michigan commences a new trial within 180 days of this order.

BACKGROUND

The substantive facts giving rise to Petitioner Diapolis Smith's conviction were described by the Michigan Court of Appeals as follows:

> [Smith]'s conviction arises out of a shooting death at So-So's Lounge in Grand Rapids. Shortly before 1 a.m., the decedent quarreled with another male bar patron identified by some witnesses as [Smith] and by other witnesses as someone else. This quarrel soon escalated into a physical confrontation with both parties participating. The decedent was struck with a glass or beer bottle, hit on the head with a pistol butt, and kicked. As many as five other males joined in the fight and struck the decedent; several witnesses identified [Smith] as one of the men who joined the fight. Although several witnesses testified that [Smith] displayed a handgun during this confrontation, struck the decedent with the butt of the gun and fired between two and six shots, other witnesses testified that someone else fired the fatal shot. The fatal bullet pierced the decedent's chest, heart, pancreas and large intestine before exiting his back, causing him to bleed to death in three minutes. The bullet also pierced the thigh of a So-So's bouncer who was attempting to break up the fight.

People v. Smith, No. 172558, 1999 WL 33445050, at *1 (Mich. Ct. App.1999).

On February 12, 1992, Petitioner was arrested and charged with one count of second-degree murder in violation of Mich. Comp. Laws § 750. 317, two counts of possession of a firearm during commission of a felony in violation of Mich. Comp. Laws § 750.227b, and one count of assault with intent to commit great bodily harm less than murder in violation of Mich. Comp. Laws § 750.84.

Petitioner, who is African American, was tried by July in Kent County Circuit Court. In 1990, the United States Census Bureau reported that 7.8 percent of the jury-eligible population in Kent County was African American and the overall percentage of African Americans in Grand Rapids, the largest city in the county, totaled 18.1 percent. Moreover, while Grand Rapids accounted for approximately 37 percent of the overall population of Kent County, it accounted for 85 percent of the African American population of the county.

Although the exact number is unclear, between 60 and 100 individuals constituted the venire panel for Petitioner's trial. At most, three of the prospective jurors were African American. Ultimately, 37 prospective jurors were examined by the parties during voir dire. Each of the 37 individuals examined by the parties was white. After the use of peremptory and for cause challenges by the parties, 14 individuals were seated as jurors in Petitioner's trial.

Prior to the jury being sworn, Petitioner challenged the composition of both the venire panel and the petit jury, alleging that African Americans had been improperly excluded. To remedy the underrepresentation of African Americans on the jury,

Petitioner requested additional peremptory challenges. Moreover, Petitioner challenged the overall selection process for the venire panel as violative of his Sixth Amendment right to a jury drawn from a fair cross-section of the community. The trial court denied Petitioner's request, finding that "there's nothing to indicate to me that the manner of selecting jurors is anything other than impartial and that there's been any type of subjective selection of jurors to create a problem in terms of representation." Thereafter, the trial court proceeded to empanel an all white jury.

After hearing all of the evidence, the jury convicted Petitioner of second degree murder and possession of a firearm during a felony. Petitioner, however, was acquitted of assault with intent to commit great bodily harm less than murder and the second count of possession of a firearm during the commission of a felony. *Smith*, 1999 WL 33335050, at *1. On November 29, 1993, the trial court conducted Petitioner's sentencing hearing. Thereafter, the trial court sentenced Petitioner to life imprisonment for the second degree murder conviction and a two year term of imprisonment for the felony-firearm conviction. I Petitioner's two year sentence was to be served consecutive to his sentence of life imprisonment. *Id.*

Petitioner appealed to the Michigan Court of Appeals, arguing a number of grounds for reversal, including the denial of an impartial jury drawn from a fair cross-section of the community in violation of the Sixth Amendment. *Id.* On May 14, 1997, the court of appeals remanded Petitioner's case to the trial court for an evidentiary hearing "to determine how jury venires were selected at the time of [Smith's] trial." *Id.* Pursuant to the remand from the state court of appeals, an evidentiary hearing took place on February 2, 1998 and April 27, 1998.

During the hearing, the trial court considered testimony from a number of witnesses regarding Kent County's jury selection process. Kim Foster, the Kent County Circuit Court Administrator, testified regarding the procedures utilized to constitute venire panels at the time of Petitioner's trial. Foster testified that "[p]ursuant to statute, our jury lists come from the driver's license lists and the Michigan identification cards issued by the Secretary of State." Foster testified that after he received the list from the Secretary of State, an estimation regarding the number of individuals that would be needed to populate juries was made with respect to the upcoming year.

Upon determining the anticipated number of jurors that would be needed by the County for the upcoming year, Kent County mailed a qualifying questionnaire to potential jurors. According to Foster, approximately 5 percent of the questionnaires mailed to prospective jurors were returned as undeliverable, while another 15 to 20 percent of the questionnaires were not returned. If a questionnaire was not returned, a letter was sent to the prospective juror outlining the penalties for the failure to respond, "as well as encouraging a response." Fifty percent of those who received the follow-up letter returned questionnaires. The remaining 50 percent who failed to return questionnaires were sent show cause orders, but no penalty followed for failure to respond. One Kent County study estimated that the areas with highest rates of non-response were those with large minority populations.

After the juror questionnaires were returned, the names of individuals who responded were placed on a qualified juror list. However, if a person who returned a questionnaire claimed a statutory exemption from jury service pursuant to Mich. Comp.

Laws § 600.1307a,[1] the individual's name was not placed on the qualified list. Based on the qualified juror list, a smaller group of potential jurors was selected at random and placed on the "second list." Individuals on the "second list" were sent notices to appear for jury duty. Foster also testified that a number of individuals who were placed on the qualified juror list could be excused from appearing for service based on non statutory excuses. For example, a prospective juror could be excused because of transportation problems, child care concerns, or the inability to take time away from work. Generally, such requests would be granted if requested, with no further proof regarding the excuse required by potential jurors or further consideration by county officials. Although Kent County tracked the names of individuals who were either placed on the list or individuals who were excused from service, the County

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[1] Mich. Comp. Laws § 600.1307a provides, in pertinent part, that

> (1) To quality as a juror a person shall:(a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the person is selected, and in the case of a district court in districts of the second and third class, be a resident of the district, and in the case of municipal courts of record, be a resident of the municipality. (b) Be conversant with the English language. (c) Be physically and mentally able to carry out the functions of a juror. Temporary inability shall not be considered a disqualification. (d) Not have served as a petit or grand juror in a court of record during the preceding 12 months. (e) Not be under sentence for a felony at the time of jury selection. A person more than 70 years of age may claim exemption from jury service and shall be exempt upon making the request.

did not record the race of the individuals being kept or excused.

Before October 1, 1993, jurors were first selected for the district courts located in the County and the remaining jurors were assigned to circuit courts. According to the testimony adduced at the evidentiary hearing, the Kent County Administrator's Office first assigned residents of Grand Rapids to juries for the 61st District Court, which is comprised of four district judges. Michigan law required that only residents of Grand Rapids could populate juries for 61st District Court. Residents of Grand Rapids would be assigned to Kent County Circuit Courts only after the 61st District Court had the requisite number of jurors.

Richard Hillary, director of the Kent County Public Defender's Office and Co-Chair of the Jury Minority Representation Committee of the Grand Rapids Bar Association, attested to the dearth of African Americans on Kent County juries. Hillary testified that "[b]lack prior to 1993, or even halfway through '93 and up to '94,1 recall there being very few, if any, minorities, specifically black potential jurors at all." Hillary estimated that, in his experience trying felony cases in Circuit Court, "98 percent of the time we had all white juries."

As a result of the concerns regarding minority representation in the jury pool, the Grand Rapids Bar Association formed the Jury Minority Representation Committee. Hillary testified that the Committee was concerned about the impact that selecting district court jurors first was having on the make up of Circuit Court jury pools:

> [I]n the city areas which the District Courts encompass, are your highest

> percentage of minorities, and the concern was that we were pulling numbers for the District Court, the District Court would select first, and then not even return the unused ones to the Circuit Court panel. And we made a determination that we were losing minorities by choosing the District Court jurors first and not returning the unused ones to the . . . pool that the Circuit Court was taken from.

Foster testified that after October 1, 1993, Kent County reversed the order of juror assignment based on "the belief that the respective districts swallowed up most of the minority jurors, and circuit court was essentially left with whatever was left, which did not represent the entire county. . . ." Although changes were made to the order of juror assignments, nothing was done to correct the lack of minority representation on the qualified list to compensate for individuals who were disqualified based on prior felony offenses or those who were excused because they did not have a ride or could not afford a babysitter. However, Foster did testify that "now once a month – [non-statutory] excuses are dealt with once an individual is summonsed to jury duty for a given month. Generally, no further action is taken dealing with an excuse."

The trial court also heard testimony from Dr. Michael Stoline, a statistician, regarding the factors that contributed to minority underrepresentation on Kent County juries. Dr. Stoline estimated that between April of 1993 to October of 1993, the period which concerned Petitioner's trial, African Americans were underrepresented on Kent County venires by approximately 18 percent. In September of 1993, the month Petitioner's jury was selected, Stoline found the underrepresentation to be much higher at 34.8 percent. Based on this disparity, Dr. Stoline concluded

that "blacks are underrepresented because of the way juror lists were drawn, using this sampling technique."

Dr. Stoline also testified that between October of 1993 and October of 1994, in ten out of the eleven months he examined, there was underrepresentation of census tracts with high black populations. Dr. Stoline estimated that there was a 15 percent underrepresentation of individuals from areas that had a high number of black residents. Dr. Stoline concluded that such disparities were larger than could be accounted for by mere chance.

Kurt Metzger, program director of the Michigan Metropolitan Information Center at Wayne State University, testified that the non-statutory excuses that enable individuals to be removed from the qualified list, such as childcare or transportation issues, disproportionately impact African American communities. Specifically, Metzger testified that 64 percent of African American households with children were headed by single parents, while only 19 percent of white families were headed by single parents. In Kent County, 27 percent of whites are renters, while 59 percent of African Americans are renters. Metzger also testified that 6.7 percent of whites live below the poverty line, while 31.5 percent of African Americans in Kent County live below the poverty line. Consequently, Metzger surmised that allowing individuals to opt out of jury service as a result of a non-statutory excuse removes the "randomness" from the jury pool selection process.

After hearing the testimony presented at the evidentiary hearing regarding Kent County's jury selection procedures, the trial court concluded that Petitioner had not been denied his right to an impartial jury drawn from a fair cross-section of the community. In particular, the trial court found that

while Petitioner had demonstrated that African Americans were underrepresented in the jury pool, he did not demonstrate that African Americans were systematically excluded from the pool by the selection procedures employed by Kent County.

Petitioner once again appealed and the Michigan Court of Appeals reversed the decision of tile trial court. *Smith*, 1999 WL 33445050, at *5. The court of appeals found that the evidence adduced at the evidentiary hearing demonstrated that the underrepresentation of African Americans in the jury pool came as a result of systematic exclusion. "[T]he underrepresentation of minorities in the jury array available to defendant did not result from 'benign' random selection but instead resulted from a defect inherent in the juror allocation process that Kent County used under the pre October 1993 system." *Id.* In particular, the court of appeals found that the assignment of prospective jurors from Grand Rapids to district courts in Grand Rapids prior to circuit courts resulted in the systematic exclusion of African Americans inasmuch as Grand Rapids accounted for the vast majority of the African American population in the county.

The Michigan Supreme Court, however, disagreed. The Michigan Supreme Court concluded that, even when giving Petitioner the benefit of the doubt with respect to his argument concerning the underrepresentation of African Americans in the jury pool, Petitioner did not show that African Americans were systematically excluded. *People v. Smith,* 615 N.W.2d 1, 4 (Mich. 2000). On remand, the Michigan Court of Appeals considered and rejected Petitioner's remaining claims and affirmed his convictions. *People v. Smith,* 2001 WL 721337, at *10 (Mich Ct. App. 2001).

Petitioner then instituted a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, asserting 12 grounds for relief, including allegations that his jury was not drawn from a fair cross-section of the community and ineffective assistance of counsel. The district court denied Petitioner's petition for habeas corpus as well as Petitioner's application for a certificate of appealability. On July 11, 2007, however, this Court granted Petitioner a certificate of appealability with respect to two issues: (1) Petitioner's constitutional right to an impartial jury drawn from a fair cross-section of the community; and (2) ineffective assistance of counsel. Inasmuch as our disposition rests on Petitioner's Sixth Amendment claim, we do not reach the issues related to his ineffective assistance of counsel claims.

DISCUSSION

I. Standard of Review

"In a habeas corpus proceeding, this Court reviews a district court's legal conclusions *de novo* and its factual findings for clear error." *Miskel v. Karnes*, 397 F.3d 446, 451 (6th Cir. 2005). However, this Court's review of a state court determination is limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

AEDPA prohibits a federal court from granting a writ of habeas corpus to a person incarcerated pursuant to a state court judgment with respect to a claim that was adjudicated on the merits in state court unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable

> application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. § 2254(d)(1')-(2). Because Petitioner filed his habeas petition after April 24, 1996, AEDPA governs this Court's review of his petition. *Williams v. Taylor*, 120 S.Ct. 1495, 1518 (2000).

A state court decision is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decision arrives at a conclusion opposite to that reached by [the Supreme Court] on a set of materially indistinguishable facts." *Williams*, 120 S.Ct. at 1523. However, as the Supreme Court noted in *Panetti v. Quarterman*, 127 S.C.t 2842 (2007), "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. '" *Id.* at 2858 (quoting *Carey v. Musladin*, 127 S.Ct. 649, 656, (2006) (KENNEDY, J., concurring in judgment)). A state court determination is an unreasonable application of clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions, but unreasonably applies that principle to the facts of the prisoner's case." *Id.* However, simply because a "standard is stated in general terms does not mean [an] application w[ill be] reasonable. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Id.* Indeed, AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable

when it involves a set of facts 'different from those of the case in which the principle was announced." *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)).

A state court decision may also be unreasonable where the state court extends a legal principle to an inapposite context or refuses to extend a principle to an analogous context. *Williams*, 120 S.Ct. at 1520. However, a federal habeas court may not reverse a state court decision on the grounds that it was unreasonable "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established law erroneously or incorrectly." *Id.* at 1522. Instead, a federal habeas court may reverse only where the state court's application of clearly established law is "objectively unreasonable." *Id* at 1521.

When evaluating the propriety of a state court's application of a legal principle to the facts of a petitioner's case, this Court must presume the factual determinations made by the state court to be correct. 28 U.S.C. § 2554(e)(1). The presumption of correctness may be rebutted only upon a showing of clear and convincing evidence to the contrary. *Williams*, 120 S.Ct. at 1523.

II. Sixth Amendment Right to an Impartial Jury Drawn from a Fair Cross-Section of the Community

Petitioner asserts that he was denied his Sixth Amendment right to a trial by an impartial jury drawn from a fair cross-section of the community. Petitioner alleges that African Americans were underrepresented in the Kent County jury pool and that the particular procedures employed by Kent County in constituting its juror pool systematically produced such underrepresentation. The Michigan Supreme Court's

conclusion to the contrary, he argues, constitutes an unreasonable application of clearly established federal law as announced in *Taylor v. Louisiana,* 419 U.S. 522 (1975) and *Duren v. Missouri,* 439 U.S. 357 (1979). For the reasons discussed below, we agree that the Michigan Supreme Court unreasonably applied federal law in rejecting Petitioner's Sixth Amendment challenge to the composition of his venire panel.

A. Clearly Established Right to Impartial Jury Drawn from a Fair Cross- Section of the Community

Under the Sixth Amendment, a criminal defendant is entitled to a trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. In *Taylor v. Louisiana,* 419 U.S. 526 (1975), the Supreme Court held that the Sixth Amendment right to an impartial jury includes the right to a jury drawn from a fair cross-section of the community. *Id.* at 530. The Court, however, "impose[d] no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.* at 538. Instead, the Court held that defendants are entitled to a jury selection process that does "not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.*

In *Duren v. Missouri,* 439 U.S. 362 (1979), the Court clarified the rule announced in *Taylor.* There, the Court held that in order to establish a violation of the Sixth Amendment's fair cross- section requirement, a defendant must make a prima facie showing

> (1) that the group alleged to be excluded is a 'distinctive' group in the community;
> (2) that the representation of this group

> in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Id. at 364. To meet this burden, a party need not show that the underrepresentation of a distinctive group came as a result of intentional discrimination. *Duren*, 439 U.S. at 368 n.26. Rather, as other circuits have observed, "[u]nlike the equal protection challenge, the fair cross section claim does not require a showing that the selection procedure is susceptible [to] abuse or not race-neutral; the defendant must only show that the exclusion of his or her group is 'systematic." *United States v. Rodriguez-Lara*, 421 F.3d 932, 939 (9th Cir. 2005); *United States v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995). Once the defendant has established a prima facie ease, the burden then shifts to the government to show that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." *Duren*, 439 U.S. at 367-68.

Moreover, to prove a violation of the Sixth Amendment, a petitioner need not prove that the outcome of his or her particular trial would have been substantively different had the petit jury been drawn from a representative pool. Rather, the Sixth Amendment's fair cross-section requirement is centrally concerned with insuring that the procedures employed by the state do not undermine the traditional role that juries play in our democracy and in our criminal justice system. The representativeness of the jury, drawn from all strata of our diverse society, is what inspires "confidence in the fairness of

the criminal justice system." *Taylor*, 419 U.S. at 530; *cf. Powers v. Ohio*, 499 U.S. 400, 413 (1991) ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."). Thus, the interference with the criminal defendant's ability or opportunity to draw a jury from a representative pool is the principal injury with which the Constitution is concerned.

The holdings of *Taylor* and *Duren*, however, were not meant to usurp the traditional role of the states in determining juror qualifications. Instead, "[t]he fair cross-section principle must have much leeway in application. The States must remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." *Taylor*, 419 U.S. at 538.

B. Reasonableness of the Michigan Supreme Court's Application of the Clearly Established Right

In addressing Petitioner's claim, the Michigan Supreme Court correctly identified the controlling standard as described in *Duren*. *See People v. Smith*, 615 N.W.2d 1, 2 (Mich. 2000). However, the Michigan Supreme Court unreasonably applied *Duren's* three prong test in rejecting Petitioner's Sixth Amendment claim. As noted above, to satisfy the prima facie test established by *Duren*, a petitioner must show that a distinctive group was underrepresented in venire panels due to systematic exclusion within the jury selection process. Because it is clear that African Americans are a distinctive group, *see, e.g., Peters v. Kiff*, 407 U.S. 493, 503 (1972), we address only the

second and third prong of the *Duren* prima facie test and the relevant Michigan state court findings.

1. Fair and Reasonable Representation

The second prong of the *Duren* test requires Petitioner to demonstrate that the representation of African Americans on Kent County venire panels was not fair and reasonable. Before the Michigan Supreme Court, Petitioner offered proof that in the six months preceding his trial, African Americans were underrepresented by 18 percent and underrepresented by 34 percent in the month his jury was selected. Additionally, Petitioner argued that in ten of the eleven months following his trial, African Americans were underrepresented by at least 15 percent. However, after applying a number of different measures of underrepresentation, including absolute and comparative disparities, the Michigan Supreme Court rejected these disparities as constitutionally insignificant.

In *Duren*, the Supreme Court utilized the absolute disparity test to determine that women were underrepresented by 35 percent in venire panels in the Missouri district at issue. *Duren*, 439 U.S. at 365 n.23. The absolute disparity test compares the members of a distinctive group that are jury eligible with those that appear on the venire. However, in the years since Duren, the Court has not mandated that a particular *method* be used to measure underrepresentation in Sixth Amendment challenges. Consequently, courts across the country have utilized a number of methods, including absolute disparity and comparative disparity, to measure whether a distinctive group has been underrepresented on venire panels. *See United States v. Forest*, 355 F.3d 942, 954 (6th Cir. 2004) (absolute disparity); *United States v. Orange*, 447 F.3d

792, 798-99 (10th Cir. 2006) (absolute and comparative disparity).

Applying the absolute disparity measurement of underrepresentation to the instant case, the disparity between jury-eligible African Americans in the community and those who appeared on Kent County venires is negligible. Here, 7.28 percent of African Americans in Kent County were eligible for jury service. During the relevant time period for Petitioner's trial, 56 of the 929 individuals who appeared for venire panels in Kent County were African American. This represents approximately six percent of the total pool of veniremen. Therefore, the absolute disparity between jury-eligible African Americans and those that actually appeared for venire panels was 1.28 percent.

Courts across the country have held that absolute disparities in this range are not constitutionally significant for purposes of *Duren's* underrepresentation requirement. *See, e.g., United States v. Booker,* No. 05-1929, 2007 WL 2492427, at *2 (6th Cir. 2007) (finding absolute disparity of 2.6 percent constitutionally insignificant); *United States v. Rioux,* 97 F.3d 648, 658 (2d Cir. 1996) (finding absolute disparity of 2.68 percent a "constitutionally insignificant" disparity when examining Sixth Amendment challenge to composition of venire panel).[2]

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[2]See also *United States v. Quinones,* No. 93-10751, 1995 WL 29500, at *9 (9th Cir. 1995) (unpublished) (finding absolute disparity of 10.05 percent for Latinos on venire panels constitutionally permissible); *United States v. Suttiswad,* 696 F.2d 645, 648 (9th Cir. 1982) (7.7 percent absolute disparity for Hispanics, 4.7 percent for Asians, 2.8 percent for African Americans found to be constitutionally permissible); *United States v. Kleifgen,* 557 F.2d 1293, 1297 (9th Cit. 1977) (2.9 percent for African Americans, 4.4 percent for males constitutionally permissible); *United*

However, the wisdom of applying the absolute disparity test to measure the underrepresentation of the small African American population in Kent County is questionable. *See United States v. Jackman,* 46 F.3d 1240, 1247 (2d Cir. 1995) (finding the absolute disparities test to be inappropriate "when applied to an underrepresented group that is a small percentage of the total population. . . .").

As the Second Circuit noted in *Foster v. Sparks,* 506 F.2d 805 (5th Cir. 1975):

> [A]n intractable use of the absolute measure may, in certain circumstances produce distorted results. For example, if a district with 10% non-white population has 5% non-whites in the wheel, the 9.5% disparity may not evoke disapproval under an absolute measure but may require it under a comparative measure.

Id. at 835. Indeed, even if African Americans in Kent County were never called for jury service, the absolute disparity would still fall below the 10 percent figure that courts have found to be a threshold indicator of a constitutionally significant disparity.

Where the distinctive group alleged to have been underrepresented is small, as is the case here, the comparative disparity test is the more appropriate measure of underrepresentation. Indeed, "[w]hile. . . both [absolute and comparative disparity] provide a simplified statistical shorthand for a complex issue, the comparative disparity calculation provides a more meaningful measure of systematic impact vis-a-vis the 'distinctive' group," *United States v. Rogers,* 73 F.3d

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States v Armstrong, 621 F.2d 951, 956 (9th Cir. 1980) (2.8 percent for African Americans constitutionally permissible).

774, 776 -77 (8th Cir. 1996), inasmuch as it "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Ramseur*, 983 F.2d at 1231-32.

In the instant case, African Americans were underrepresented on Kent County venire panels by 18 percent in the six months prior to Petitioner's trial as measured by comparative disparity. In the month during which Petitioner went to trial, this comparative disparity increased to 34 percent. In other words, the number of African Americans on Kent County venire panels was 18 and 34 percent lower than one would have expected based on random selection factors. These figures, which are larger than those revealed by the absolute disparity test, are sufficient to demonstrate that the representation of African American veniremen in Kent County at the time of Petitioner's trial was unfair and unreasonable. *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) (finding comparative disparity of over 30 percent to meet the underrepresentation prong of the *Duren* prima facie test where African Americans comprised only 1.87 percent of the jury-eligible population); *Ramseur*, 983 F.2d at 1232 (finding comparative disparity of 40 percent of African Americans to be sufficient to establish underrepresentation of African Americans in jury pool). Thus, Petitioner has established that African Americans were underrepresented on Kent County venire panels.

Resolving the question of underrepresentation on Kent County venire panels, however, does not resolve the question of whether Petitioner has met his burden under AEDPA. To prevail under AEDPA, Petitioner must demonstrate not only that the Michigan Supreme Court was incorrect, but that its application of federal law was unreasonable. The

Michigan Supreme Court found that Petitioner's figures did not demonstrate that African Americans were significantly underrepresented on Kent County venire panels. After a cursory discussion of the absolute and comparative disparity tests, the supreme court concluded that "defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests." *Smith*, 615 N.W.2d at 3. Other courts have reached the same conclusion when faced with such disparities. *See, e.g., Johnson v. McCaughtry,* 92 F.3d 585, 594 (7th Cir. 1996) (comparative disparity of 33 percent insufficient to satisfy second prong of *Duren* prima facie case).

Because of the relatively small size of the African American population in Kent County, however, none of the applicable tests can appropriately measure the underrepresentation that occurred on Kent County venire panels. Rather, as the concurrence in Smith noted, "because the jury-eligible black population of Kent County is small, and the sample of the overall population represented by the jury pool is also small, none of the analytical methods are particularly well-suited to defendant's case." 615 N.W.2d at 11 (Cavanagh, J., concurring). In such cases, "[i]f a jury selection process appears ex ante likely to systematically exclude a distinctive group, that is, the system contains 'non-benign' factors, a court may essentially give a defendant the benefit of the doubt on underrepresentation, even if the system ex post proves to work no systematic exclusion." *Id.* Other courts have similarly found significant underrepresentation in the context of small minority populations that would otherwise not satisfy the requisite burden under *Duren* where "non-benign factors" may be operating to produce such underrepresentation. See *United States v. Jackman*, 46 F.3d 1240, 1247-48 (2d Cir. 1995) (citing *United*

States v. Biaggi, 909 F.2d 662, 678 (2d Cir. 1990)). Thus, the Michigan Supreme Court properly examined *Duren's* third prong given the significant risk of systematic exclusion of African Americans. However, for the reasons discussed below, we find that the Michigan Supreme Court unreasonably applied federal law in concluding that Kent County's jury selection process "work no systematic exclusion," *id.*, and that Petitioner therefore did not establish the prima facie case under Duren.

2. Systematic Exclusion

To establish a prima facie case of a violation of the Sixth Amendment's right to a jury drawn from a fair cross-section of the community, Petitioner must demonstrate that African American underrepresentation occurred as a result of systematic exclusion from venire panels. Under *Duren*, "disproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." *Randolph v. People of the State of California*, 380 F.3d 1133, 1141 (9th Cir. 2004). The Supreme Court has described "systematic exclusion" to mean exclusion "inherent in the particular jury-selection process utilized." *Duren*, 439 U.S. at 366.

In his petition for writ of habeas corpus, Petitioner advances three arguments regarding systematic exclusion from Kent County venire panels. First, Petitioner asserts that Kent County's practice of assigning jurors to district court panels prior to assigning jurors to circuit courts produced the underrepresentation of African Americans on Kent County circuit court venires. Second, Petitioner argues that Kent County's practice of granting excused absences from jury duty for reasons such as lack of transportation or child care resulted in the

disproportionate excusal or exclusion of African Americans from venire panels. Third, Petitioner attributes African American underrepresentation to Kent County's failure to send additional letters to areas with high concentrations of African Americans and nonresponders.

In examining Petitioner's contentions regarding the connection between the underrepresentation of African Americans and the jury selection procedures employed by Kent County, the Michigan Supreme Court found that:

> We further agree with our concurring colleague that defendant has not shown how the alleged siphoning of African-American jurors to district courts affected the circuit court jury pool. The record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool. Defendant has simply failed to carry his burden of proof in this regard.
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> We also agree with our concurring colleague that the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans. The Sixth Amendment does not require Kent County to counteract these factors.
>
> Finally, even presuming that defendant can rely exclusively on statistics, he has not made the requisite showing in this case. In *Duren*, the Court noted that the defendant proved that a large discrepancy occurred in every weekly venire for

> approximately one year. Here, while defendant's proof may satisfy any duration requirement, the disparities over that time fell far short of those in *Duren*. We therefore conclude that defendant has not shown a systematic exclusion of African-Americans for the Kent County Circuit Court jury pool.

Smith, 615 N.W.2d at 4.

We find that the Michigan Supreme Court unreasonably applied federal law when it held that the underrepresentation of African Americans did not occur as a result of systematic exclusion. In the instant case, Petitioner demonstrated that African Americans were underrepresented on Kent County venire panels by between 15 and 18 percent over a period of 17 months and 34 percent in the month during which his jury was drawn. While this disparity may not rise to the level of demonstrating systematic exclusion per se, this persistent disparity combined with Petitioner's evidence that this disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*. *United States v. Rogers,* 73 F.3d 774, 777 (8th Cir. 1996) ("The extremely low probability that the underrepresentation would have occurred by chance alone provides thither evidence that the system itself contributed to the lack of African-American participation in the venire pools."). Rather, for the reasons described below, Petitioner demonstrated that the underrepresentation of African Americans was "inherent in the particular jury-selection process utilized," and therefore met his burden to demonstrate that African Americans were systematically excluded from Kent County venire panels.

In the instant case, Kent County allowed prospective jurors to essentially "opt out" of jury service if jury duty would constitute a hardship based on child care concerns, transportation issues or the inability to take time from work. The evidence in the record suggests that the excuses allowed by Kent County with respect to child care and transportation disproportionately impacted African American prospective jurors.[3] In Kent County, for example, 64 percent of the African American households with children were headed by single parents, while only 19 percent of white families were headed by single parent households. Thus, allowing an excuse for the inability to find child care with no questions asked would likely disproportionately exclude African Americans from venire panels. Indeed, an expert testified that allowing

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[3] This case is distinguishable from other cases in which courts have held that permitting excuses from jury duty because of hardship did not constitute systematic exclusion. In such cases, the proof offered by the party challenging the venire suffered from infirmities, which are not present in the instant case, that undermined the strength of the inferences supporting a conclusion that the excuses were causing the underrepresentation of a distinctive group. *See, e.g., McGinnis v. Johnson*, 181 F.3d 686, 690-91 (5th Cir. 1999) (finding excusal of three African American venire persons for personal reasons by trial court pursuant to Texas statute did not violate Sixth Amendment fair cross-section requirement because the petitioner offered evidence only of representation on his own venire panel); *Coleman v. McCormick*, 874 F.2d 1280, 1285 (9th Cir. 1989) (finding that excusing individuals on venire because of unavailability was not a systematic exclusion because petitioner "did not contend that the [] jurors [seated for his venire] were not representative of a fair cross-section of the community").

individuals to opt out of jury service as a result of a non-statutory excuse removes the "randomness" from the jury pool selection process. The introduction of non-random factors into a jury selection process has been found to support an inference of systematic exclusion. *See, e.g., United States v. Young,* 822 F.2d 1234, 1239 (2d Cir. 1987); *United States v. Osorlo,* 801 F.Supp. 966, 978 (D. Conn. 1992). The lack of random selection in the Kent County jury selection process leads us to conclude that the underrepresentation of African Americans resulted from processes "inherent in the particular jury-selection process utilized." *Duren*, 439 U.S. at 366.[4]

The Michigan Supreme Court, however, rejected this evidence after finding that the Sixth Amendment is not concerned with the disparate impact of the non-statutory excuses because, in the supreme court's estimation, such disparities were rooted in "social and economic factors." Contrary to the conclusion reached

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[4] The case relied upon by the Michigan Supreme Court for the proposition that the Sixth Amendment does not require jurisdictions to counteract "private sector influences" did not address particular criteria utilized as part of the construction of a qualified list of jurors or the excuses of individuals once placed on a qualified list. *See, e.g., United States v. Purdy*, 945 F.Supp. 1094, 1104 (D. Conn. 1996). In *Purdy*, the district court noted that jurisdictions were not obligated to counteract private sector influences such as rates of voter registration when individuals are drawn from lists of registered voters or the failure to return juror questionnaires. *Id.* ("Because the district does not have an obligation under the Sixth Amendment to affirmatively counteract 'private sector influences,' neither the failure to mail follow-up questionnaires to persons who did not respond to the May 1995 mailing nor the failure to follow Magistrate Margolis' recommendations for increasing minority participation constitute 'systematic exclusion.").

by the Michigan Supreme Court, the Sixth Amendment is concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel.[5] Indeed, "the disproportionate utilization of juror excuses by a given group may have clear importance where the Sixth Amendment's fair-cross section requirement is involved." *Hirst v. Gertzen,* 676 F.2d 1252, 1261 (9th Cir. 1982) (citing *Duren,* 439 U.S. at 357). If, for example, a county created a juror exemption or an excuse for renters where 90 percent of African Americans in the county fell into that category, any resulting underrepresentation would clearly be "inherent in the system" inasmuch as the system made a socio-economic factor (i.e., renting) relevant to the makeup of the jury pool. Although certainly less drastic, the same principle applies in the instant case.

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[5] Courts, however, have been relatively uniform in finding that the failure to send additional letters to individuals who did not to respond to questionnaires was not "systematic exclusion" within the meaning of *Duren.* In *United States v. Orange,* 447 F.3d 792, 800 (10th Cir. 2006), for example, the Tenth Circuit held that "[d]iscrepeancies resulting from the private choices of potential jurors" with respect to the return of juror questionnaires, "do not represent the kind of constitutional infirmity contemplated by *Duren.*" *See also Randolph v. People of the State of California,* 380 F.3d 1133, 1141 (9th Cir. 2004) (finding that failure to follow up with individuals who did not return juror questionnaires was insufficient to establish systemic exclusion of Latinos from venire panels); *United States v. Rioux,* 97 F.3d 648 (2d Cir. 1996) (same). Thus, the Michigan Supreme Court's finding that African Americans were not systematically excluded by Kent County's failure to more aggressively pursue individuals who did not respond to juror questionnaires was not an unreasonable application of federal law.

Here, the particular jury selection process employed by Kent County made social or economic factors relevant to whether an otherwise qualified prospective juror would be excused from service; and because such social or economic factors disproportionately impact African Americans in Kent County, such factors produced systematic exclusion within the meaning of *Duren* inasmuch as they are "inherent in the particular jury selection process utilized." *Duren*, 439 U.S. at 366.

Moreover, those African Americans that actually appeared for jury duty were diverted away from circuit courts because of the priority given to the district court in Grand Rapids. Before October 1993, Kent County summoned individuals from the qualified list to appear for juries at district courts prior to assigning jurors for county circuit courts. As part of this priority assignment process, prospective jurors from Grand Rapids were solely designated for venire panels for the district court in Grand Rapids. It is undisputed in the record that Grand Rapids is the city with the largest African American population in the county. Indeed, although African Americans are approximately 18 percent of the total population of Grand Rapids, the African American population in Grand Rapids represents approximately 85 percent of the African American population in Kent County. Moreover, by statute, once an individual was assigned to a district court venire, he or she was not placed back on the qualified list for the circuit court because of a statutory exclusion for individuals who served on a jury in the previous twelve months. As a consequence of the assignment process, regardless of the number of African Americans assigned to district courts, fewer African Americans were available to serve as jurors for county circuit courts.

Indeed, the aforementioned statistics were confirmed by the testimony of two witnesses

intimately familiar with the jury selection process in Kent County at the time Petitioner's jury was drawn. Richard Hillary, director of the Kent County Public Defender's Office and Co-Chair of the Jury Minority Representation Committee of the Grand Rapids Bar Association, testified that he routinely observed very few African Americans on Kent County venire panels. Hillary testified that the Jury Minority Representation Committee studied the phenomenon and determined "that we were losing minorities by choosing the District Court jurors first and not returning the unused ones to the pool that the Circuit Court was taken from." Kim Foster, the Kent County Court Administrator, admitted as much during his testimony. During the evidentiary hearing, Foster stated that Kent County revised the juror assignment policy based on "the belief that the respective districts swallowed up most of the minority jurors, and circuit court was essentially left with whatever was left, which did not represent the entire county.. . ." We find that this evidence, combined with the duration of the underrepresentation of African Americans, demonstrates that such underrepresentation came as a consequence of a factor that was inherent in the jury assignment system.

On direct appeal, the Michigan Supreme Court found that Petitioner did not demonstrate systematic exclusion because he did not provide the precise number of jurors that were diverted from circuit courts. The systematic exclusion requirement as discussed in *Duren*, however, does not mean that a defendant's proof must be unequivocal, as the Michigan Supreme Court required, but instead, the proof must be sufficient to support an inference that a particular process results in the underrepresentation of a distinctive group. *Duren*, 439 U.S. at 363, 366-67; *Jackman*, 46 F.3d at 1248. In *Duren*, the Supreme Court considered whether a statute that provided an

exemption for women from jury duty during the jury selection process violated the fair cross-section requirement of the Sixth Amendment. There, women were underrepresented on weekly venire panels over a one year period. Although women constituted 54 percent of the population, they were only 30 percent of the potential jurors who were summonsed and 14.5 percent of those who appeared for jury duty. Based on when the underrepresentation of women appeared in the jury selection process and the duration of the underrepresentation, the Court found that the exemption functioned to systematically exclude women. In so holding, the Court rejected a decision by the Missouri Supreme Court which found that no Sixth Amendment violation occurred because "petitioner had not unequivocally demonstrated the extent to which the low percentage of women was due to the automatic exemption for women, rather than to sex-neutral exemptions such as that for persons over age 65." *Duren*, 439 U.S. at 363. Thus, although there were other exemptions that could have affected the representation of women, the petitioner was not required to disprove the other exemptions as causes or to demonstrate precisely the number of women electing to opt out of jury duty under the exemption. *Id.* at 366-67.

The exclusionary process that is inherent in the system of selecting prospective jurors need not be facially exclusionary or as stark as *Duren*, however, to raise an inference of systematic exclusion.[6] In

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[6] Indeed, the Michigan Court of Appeals has found a violation of the fair cross-section requirement under circumstances strikingly similar to the case at bar. In *Hubbard*, the Michigan Court of Appeals considered a Sixth Amendment challenge to a jury selection plan that operated in the same fashion as the plan in Kent County. In that case, Kalamazoo County assigned jurors to district courts

Jackman, 46 F.3d at 1248, for example, the Second Circuit found that the underrepresentation of African Americans and Latinos on venire panels was due to systematic exclusion where a computerized process that predominately generated the qualified juror list inadvertently omitted residents of two cities with the highest minority populations. There, the court considered a jury selection procedure adopted by county officials to correct a previous jury selection process that had been ruled unconstitutional because it excluded residents of two cities that accounted for "62.93% of the voting-age Black population and 68.09% of the voting-age Hispanic population in the division . . . ." *Id.* Rather than discard the old list, the jury clerk for the county merely supplemented the list created under the unconstitutional system with names from the revised representative list on an as-needed basis. For the venire panel challenged on appeal, for example, the jury clerk drew 84 percent of the names from the unconstitutional list (i.e., exclusionary list) and added only 16 percent of the names from a new (i.e., representative) list. While the court did not have precise figures regarding the number of minorities excluded, the court nevertheless found that the underrepresentation of African Americans and Hispanics was "quite obviously due to the system by which juries were selected" because of the continued exclusion of a significant percentage of the minority population. *Id.* at 1248 (quoting *Duren*, 439 U.S. at 367).

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prior to assigning jurors to venire panels for the circuit courts. A study revealed that this practice resulted in 75 percent of African Americans being diverted to district courts. *Id.* at 500. After reviewing the selection process employed by Kalamazoo County, the *Hubbard* court found that the underrepresentation of African Americans on Kalamazoo County venires resulted from systemic exclusion. Id. at 504.

In the instant case, like *Duren* and *Jackman*, a substantial percentage of African Americans in Kent County were impacted by the jury excuse and the district court priority assignment processes. Indeed, the comparison to *Jackman* is particularly apt with respect to the district court assignment plan. Inasmuch as Grand Rapids represented 85 percent of the African American population in Kent County, the assignment of jurors away from circuit courts, even when they did not ultimately serve as petit jurors, essentially omits those residents from the available pool of circuit court juries. Thus, taken together, Petitioner's proof with respect to the juror excuses and the diversion of jurors to the Grand Rapids district court under the pre-1993 assignment plan satisfies *Duren's* third prong. Given the small percentages of African American jurors and the impact that just on or two can have on the overall percentage of African Americans represented on venire panels,[7] we find that this evidence establishes that the underrepresentation of African Americans was caused by systematic exclusion inasmuch as this selection process resulted in fewer African Americans being eligible for service on circuit county juries.

The inference raised by Petitioner's proof is much stronger than in cases where we have rejected claims of systematic exclusion. In *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988), we held that "the selection of jurors from a neutral master list, without more, can be construed as 'systematic exclusion' as defined in *Duren* merely because the percentage of women selected does not precisely mirror the percentage of women in the

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[7] For example, in October 1993, the month in which Petitioner's jury was drawn, there was a comparative disparity of 34 percent for African Americans on Kent County venire panels. In raw numbers, this represents a disparity of approximately four African American jurors.

entire community." In *United States v. Allen*, 160 F.3d 1096, 1104 (6th Cir. 1998), we found that the defendants asserting that African Americans were systematically excluded because their venire panel was populated by persons previously stricken from other panels did not satisfy their burden because "they have neither asserted nor provided even a shred or evidence indicating that only whites are reassigned, while blacks are thrown back into the small wheel." Here, Petitioner has demonstrated "more" than the selection of jurors from a neutral master list, he has offered evidence sufficient to raise an inference that the particular processes used by Kent County in constituting its qualified and second lists systematically exclude African American jurors and thus has satisfied the third prong of the prima facie test.

Our conclusion that Petitioner has established a prima facie violation of the Sixth Amendment's fair cross-section requirement, however, does not end the inquiry. Once a party has met the prima facie test, the burden shifts to the state to demonstrate that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-68.

The first aspect of the jury selection process that must be justified by Respondent is the excusals for economic hardship. In *Duren*, the Supreme Court anticipated that jury selection plans would preserve excuses from jury service based on economic or personal hardship. The *Duren* court noted, "it is unlikely that reasonable exemptions, such as those based on special hardship, incapacity, or community needs, 'would pose substantial threats that the remaining pool of jurors would not be representative of

the community." *Duren*, 439 U.S. at 370 (quoting *Taylor*, 419 U.S. at 534). We find that the state has a significant interest avoiding undue burdens on individuals by allowing excuses based on the inability to obtain transportation and "in assuring that those members of the family responsible for the care of children are available to do so." *Id. See also Thiel v. Southern Pacific Co.*, 328 U.S. 217,225 (1946) ("It is clear that a federal judge would be justified in e a daily wage earner for whom jury service would entail an undue financial hardship.").[8] Thus, Respondent has met her burden with respect to Kent County's excusal of prospective jurors citing hardships.

Respondent, however, has not demonstrated a significant interest in the assignment of Grand Rapids residents to the 61st District Court in Grand Rapids prior to assignment in Kent County circuit courts. Indeed, Kent County has eliminated the priority assignment policy based precisely on the grounds highlighted by Petitioner in this case. Therefore, Petitioner has demonstrated a violation of his Sixth Amendment right to a jury drawn from a fair cross-section of the community and the Michigan Supreme Court's conclusion to the contrary constitutes an unreasonable application of *Duren*.

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[8] Our holding, however, is limited to cases where it can be shown that the excuses at issue here "are appropriately tailored to this interest[s]" presented by the state. *Id.* Where it can be shown that an excuse or exemption is unreasonable in relation to the significant interest of the state, a state may not meet its burden to demonstrate that "a significant state interest [is] manifestly and primarily advanced" by such excuses or exemptions.

CONCLUSION

For the reasons stated above, we **REVERSE** the judgment of the district court with respect to Petitioner's Sixth Amendment claim that his ju was not drawn from a fair cross-section of the community and **REMAND** the case with instructions that the district court order Smith's release from state custody unless the state of Michigan commences a new trial within 180 days of this order.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 24, 2008
LEONARD GREEN, CLERK

No. 06-1463

DIAPOLIS SMITH,
Petitioner - Appellant,

v.

MARY BERGHUIS, Warden,
Respondent - Appellee.

Before: MOORE and CLAY, Circuit Judges;
SCHWARZER, Senior District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED with respect to Petitioner Diapolis Smith's Sixth Amendment claim. IT IS FURTHER ORDERED that the case is REMANDED with instructions that the district court order Smith's release from state custody unless the state of Michigan commences a new trial within 180 days of the date of the order of this court.

ENTERED BY ORDER OF THE COURT

s/Leonard Green

Leonard Green
Clerk

No. 06-1463

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIAPOLIS SMITH	)	FILED
	)	Feb 09, 2009
Petitioner-Appellant,	)	LEONARD GREEN
v.,	)	Clerk
	)	
MARY BERGHUIS, WARDEN,	)	ORDER
	)	
Respondent-Appellee.	)	

BEFORE: MOORE and CLAY, Circuit Judges; and SCHWARZER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/Leonard Green

Leonard Green
Clerk

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* Hon. William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIAPOLIS SMITH,

Petitioner

v. Case No. 1:03-CV-87

MARY BERGHUIS,

HON. GORDON J. QUIST

Respondent.

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OPINION REGARDING REPORT AND RECOMMENDATION

The Court has before it Petitioner's Objection to the Report and Recommendation dated October 28,2005, in which Magistrate Judge Brenneman recommended that Petitioner's petition for writ of habeas corpus be denied. Petitioner raised twelve issues in his habeas petition. In a lengthy report and recommendation, the magistrate judge concluded that some issues were procedurally defaulted and, therefore, not subject to federal habeas review and that the remaining issues were without merit. Petitioner contends that the magistrate judge's conclusions with regard to all twelve issues were erroneous, After conducting de novo review of the report and recommendation, the Court concludes that the report and recommendation should be adopted by the Court.

Discussion

I. Jury Underrepresentation

The magistrate judge concluded that the Michigan Supreme Court's decision regarding Petitioner's claim that his right to a jury drawn from a "fair cross section" of the community guaranteed by the Sixth and Fourteenth Amendments did not constitute an unreasonable application of the United States Supreme Court's decision in Duren v. Missouri, 439 U.S. 357, 99 5. Ct. 664 (1979). Under Duren a defendant may establish a prima facie violation of the fair cross section requirement by showing:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Id. at 364, 99 S. Ct. at 668. The Michigan Supreme Court concluded that Petitioner met the first prong and it gave Petitioner the benefit of the doubt on the second prong (unfair and unreasonable underrepresentation), but it held that Petitioner failed to show that the underrepresentation was caused by the jury selection process used by Kent County. See People v. Smith, 463 Mich. 199, 203, 204 N.W.2d 1, 2 (2000). The magistrate judge concluded that the Michigan Supreme Court's holding does not constitute an unreasonable application of Duren because: (1) Duren does not specify an approach for measuring underrepresentation and the Michigan Supreme

Court's consideration of all three tests applied by lower federal courts was proper; (2) the court correctly noted that the disparities in Petitioner's case were far more modest than those in Duren and (3) the court correctly determined that, although the statistical occurrence of fewer African was not random, Petitioner failed to present evidence that the disparity occurred because the jury selection process itself caused the exclusion of the group. (Report & Recommendation ("R & R") at 41.) With regard to the "systematic exclusion" prong, the magistrate judge noted that the Supreme Court nas (sic) never held that a state is required to accommodate social and economic factors that could have affected the racial makeup of Kent County juries. (Id.) The magistrate judge also observed that Petitioner's evidence regarding the effect of the selection of district court juries before circuit court juries was inconclusive because Petitioner failed to demonstrate that there were disparities in the proportion of district court jurors drawn in the Grand Rapids district court as compared to the other district courts within the circuit and that the alternative explanation (which did not constitute systematic exclusion) was not the likely cause for the statistical disparities.

Petitioner contends that the magistrate judge's conclusion on this issue was erroneous for several reasons. The Court finds none of these arguments persuasive. First, as the magistrate judge observed, the Michigan Supreme Court correctly observed that while Petitioner's proof satisfied any durational requirement from Duren the disparities at issue in Duren were much greater than those at issue in Petitioner's case, and nothing in Duren indicates that the disparities in the instant case are so significant that the percentage of African-Americans in the juror pool was not "reasonably representative" of the community. Second, although Petitioner contends that

the state court should not have used the "absolute disparity test," the magistrate judge correctly observed that the state court considered all three of the tests applied by lower federal courts — not merely the "absolute disparity test" — and doing so did not constitute an unreasonable application of Duren because the Supreme Court has not held that courts should use a specific method for determining underrepresentation. Third, the magistrate judge correctly determined that the state court's conclusion that Petitioner failed to show that any underrepresentation was systematic was not unreasonable.[1] Although Petitioner's witnesses testified that the statistical occurrence of fewer African-Americans was not random, Petitioner's own evidence showed that social and economic factors unrelated to Kent County's jury selection process provided another possible explanation. Moreover, Petitioner failed to show whether or how the alleged siphoning of African-American jurors affected the circuit court jury pool.

II. Exclusion of Evidence of Police Threat

Petitioner contends that the magistrate judge erred in concluding that procedural default bars review of this issue and that the state court's determination that Petitioner was not deprived of his right to present a defense in violation of the

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[1] Petitioner argues that the magistrate judge improperly relied upon Polk v. Hunt No. 95-5323, 1996 WL 47110 (6th Cir. Feb. 5, 1996), because it is an unpublished decision and because the opinion conflicts with Duren because it holds that intent to discriminate is required to show systematic underrepresentation, whereas Duren imposes no such requirement. Regardless of Polk's language, it is quite apparent to the Court that the magistrate judge cited Polk along with several other cases, as support only for the proposition that states are not required to take into account factors not inherent in the jury selection system itself.

Confrontation Claus was not an unreasonable application of established Supreme Court precedent. Contrary to Petitioner's suggestion, the magistrate judge did not apply the bar of procedural default but instead addressed the issue on the merits. Moreover, the Court agrees with the magistrate judge that the state court's determination on the merits was reasonable. As the magistrate judge noted, the limitation of Petitioner's questioning of Katherine Brown was rooted in basic evidentiary rules regarding hearsay testimony, and Petitioner was afforded the opportunity to argue Katherine Brown's bias and lack of credibility through Katherine Brown's own testimony and the testimony of Detective Lyzenga.

III. Improper Exclusion of Evidence — Robert Glass Admission

The magistrate judge concluded that the state court's exclusion of witness John Dent's testimony that "Yankee" (Robert Glass) admitted to Dent that he (Yankee) committed the shooting at So-So's was not an unreasonable application of established Supreme Court precedent. In particular, the magistrate judge noted that the circumstances in Petitioner's case were sufficiently different from those in Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973), that the state court's exclusion of Dent' s testimony was not unreasonable. The differentiating circumstances were: (1) Chambers and the other cited Supreme Court cases involved the wholesale exclusion of an entire category of evidence or witnesses under state evidentiary rules, whereas the Michigan evidentiary rule in this case provided a hearsay exception for statements against penal interest supported by circumstances indicating trustworthiness of the statement; (2) Glass' alleged admission (to Dent) that he (Glass) lured the victim outside of So-So's and shot him was at odds with all of the other evidence, which showed that shooting

occurred inside the bar; and (3) Glass allegedly made the confession while Petitioner was present, thus undermining a finding of spontaneity. Contrary to Petitioner's argument, the magistrate judge did not hold that Chambers is no longer the law, (R & R at 48 (noting that "*Chambers* and its progeny unquestionably remain 'the law"), but instead he observed that subsequent Supreme Court decisions have recognized that Chambers should only be applied in limited circumstances. See United States v. Scheffer, 523 U.S. 303,316, 118 S. Ct. 1261, 1268 (1998) ("*Chambers* therefore does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence."). In fact, the Court in Chambers was careful to note that it did not intend its holding to "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures" and that its holding was limited to the facts and circumstances of the case. Chambers, 410 U.S. at 302-03, 93 S. Ct. at 1049. As the magistrate judge concluded, the state court's determination was not unreasonable because unlike Chambers the circumstances of this case suggested a lack of trustworthiness. Moreover, as the Michigan Court of Appeals noted, Petitioner was not foreclosed from presenting his defense because Glass testified at trial and was subject to cross-examination by Petitioner.

IV. Prosecutorial Misconduct – Questioning of Witnesses

The magistrate judge concluded that this issue was procedurally defaulted because Petitioner failed to preserve the alleged en at trial by objecting and Petitioner did not attempt to demonstrate cause for the procedural default. Nonetheless, the magistrate

judge found that the claim was without merit because the prosecutor's comment did not constitute improper testimony, but instead referred to earlier statements made by the witness (Latonia Thrash) during the course of her testimony. Petitioner contends that the magistrate judge and the Michigan Court of Appeals unreasonably found that defense counsel failed to object with regard to Thrash's testimony. Petitioner contends that on the merits, the magistrate judge unreasonably determined that the prosecutor's questioning of Thrash concerned Thrash's prior testimony because the prosecutor actually questioned Thrash about comments she made in a private conversation with the prosecutor. Finally, Petitioner argues that the magistrate judge completely failed to discuss the merits of the issue regarding the prosecutor's questioning of witness Ernest Watson. Even if Petitioner's claim were not procedurally defaulted, Petitioner failed to demonstrate that the prosecutor acted improperly. The prosecutor was merely asking both witnesses about their prior out-of-court statements for purposes of impeachment. The prosecutor asked the witnesses about their prior statements and gave them an opportunity to deny or explain their prior statements. Petitioner has failed to show that the prosecutor's questioning denied him a fair trial.

V. Improper Use of Grand Jury Testimony

The magistrate judge concluded that this issue is procedurally defaulted because Petitioner failed to object to the evidence at trial and he failed to demonstrate cause for the procedural default. Petitioner asserts that the magistrate judge erred because the Michigan Court of Appeals actually considered the issue on the merits. Even so, the magistrate judge was correct in noting that Petitioner failed to demonstrate a fundamental miscarriage of

justice. As the Michigan Court of Appeals observed, although Glass testified that he did not see Petitioner with a gun that night, other witnesses testified that they saw Petitioner with a gun either immediately before, during, or after the shooting, and Petitioner had the opportunity to cross-examine Glass regarding his grand jury testimony.

VI. Improper Exclusion of Evidence — Testimony About Witness Position

Petitioner contends that the magistrate judge erred in concluding that this ground should be rejected. Petitioner contends that he should have been permitted to question Leonora Jones about the location of her brother, Anthony Hardin, at the time of the shooting and his ability to see the shooter re-enter the bar and fire additional shots into the air Petitioner contends that questioning Jones on that issue would have allowed the jury to assess Hardin's truthfulness and to point out an inconsistency between Hardin's testimony and Jones' testimony. However, as the magistrate judge noted, such testimony would have been speculative because Jones testified that she did not see her brother because he was behind her. Moreover, Petitioner extensively cross-examined both Jones and Hardin regarding the circumstances of the shooting and could have established any inconsistencies through Hardin's testimony as well as through the testimony of other witnesses.

VII. Confrontation Clause — Police Officer Testimony

With regard to Petitioner's claim of improper admission of police officer testimony, the magistrate judge concluded that the claim is procedurally defaulted and that Petitioner did not demonstrate cause, or, in the alternative, Petitioner's rights under

the Confrontation Clause were not violated because some of the police officer testimony was not hearsay and, as for the other testimony, the witnesses who made the out-of-court statements testified at trial and were subject to cross- examination. The Court has reviewed Petitioner's objection regarding this issue and is not persuaded that the magistrate judge erred in his conclusion.

VIII. Prosecutorial Misconduct — Improper Argument

The magistrate judge concluded that the Michigan Court of Appeals' conclusion that the prosecutor's remarks in his closing statement regarding witnesses' fear of Petitioner and their courage to identify him as the shooter did not deprive Petitioner of a fair trial was not an unreasonable application of the factors identified by the Supreme Court in Darden v. Wainwright 477 U.S. 168, 106 S. Ct. 2464 (1986). The magistrate judge concluded that the state court's conclusion was not unreasonable because the prosecutor's argument was supported by evidence and reasonable inferences that could be drawn from the evidence and the prosecutor's comments were not continuous but occurred over a brief period during closing arguments. The magistrate judge also noted that the trial judge reminded the jurors that they should consider only the evidence presented at trial and should avoid speculation regarding evidence that was not presented to the jury. Although, as Petitioner notes, only one or two of the prosecution's many witnesses testified about being scared of Petitioner, in light of the isolated nature of the prosecutor's comments and the trial court's instruction to the jury, the Court agrees with the magistrate judge that the state court's conclusion was not unreasonable.

IX. Unconstitutionally Suggestive Lineup

The magistrate judge recommended that this claim be rejected because Petitioner failed to demonstrate by clear and convincing evidence that the state courts' factual findings regarding the suggestiveness of the lineup were error and because Petitioner failed to demonstrate that the Michigan Court of Appeals' determinations were objectively unreasonable. Petitioner's primary argument is that the county defender's testimony regarding the suggestiveness of the lineup was uncontradicted and that Petitioner differed from the other lineup participants in several respects. However, the Michigan Court of Appeals determined from the photograph of the lineup that Petitioner was sufficiently similar to the other participants to prevent a suggestive identification. This finding is supported by the fact that only three out of twelve witnesses picked Petitioner out of the lineup. Furthermore, the Court rejects' Petitioner's argument that the assistant prosecutor's question to the witnesses was unduly suggestive.

X. Improper Reference to Jail

The magistrate judge concluded that this claim should be rejected as procedurally defaulted and that Petitioner failed to show cause or prejudice for the default. He also noted that Petitioner was not harmed by testimony that he had been in jail because Petitioner himself testified about the incarceration. Petitioner concedes in his objection that this claim is procedurally defaulted, and he fails to identify any good reason why this Court should disregard the procedural bar.

XI. Ineffective Assistance of Trial Counsel

Petitioner does not take issue with the magistrate judge's findings and conclusions on this claim. He argues, however, that he is entitled to an evidentiary hearing on this claim. The Court disagrees, because as the magistrate judge noted, the factual predicate for Petitioner's claim is already apparent on the record. Moreover; Petitioner fails to explain how an evidentiary hearing would have furthered his argument.

XII. Ineffective Assistance of Counsel at Sentencing

The magistrate judge concluded that the decision on the Michigan Court of Appeals was reasonable because Petitioner failed to show that his counsel's performance at sentencing fell below an objective standard of reasonableness and that Petitioner was prejudiced by counsel's deficient performance. More specifically, he noted that the Michigan Court of Appeals noted that Petitioner failed to identify any mitigating information that his counsel failed to bring to the trial court's attention during the sentencing, and that Petitioner did not contradict his counsel's representation to the court that he and Petitioner reviewed the presentence investigation report, although Petitioner had sufficient opportunity to bring that fact to the trial court's attention. Petitioner has not shown that the state court's decision constituted an unreasonable application of Supreme Court precedent, including Strickland v. Washington 466 U.S. 668 (1984).

Accordingly, the Court rejects Petitioner's objections and will adopt the magistrate judge's report and recommendation.

An Order consistent with this Opinion will be entered.

Dated: February 23, 2006

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIAPOLIS SMITH,

Petitioner,

v. Case No. 1:03-CV-87

MARY BERGHUIS, HON. GORDON J. QUIST

Respondent.

_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation issued October 28, 2005 (docket no. 42) is **APPROVED AND ADOPTED** as the Opinion of this Court.

IT IS FURTHER ORDERED that Petitioner's petition for writ of habeas corpus is **DENIED**.

This case is **concluded**.

Dated: February 23, 2006

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIAPOLIS SMITH,	)	
	)	
Petitioner,	)	Case No. 1:03-cv-87
	)	
v.	)	Honorable Gordon J.
	)	Quist
MARY BERGHUIS,	)	
	)	**REPORT AND**
Respondent.	)	**RECOMMENDATION**

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Because Petitioner filed his habeas application after the enactment of the Antiterrorism and Effective Death Penalty Act, PUB. L. 104-132, 110 STAT. 1214 ("AEDPA"), the provisions of that law govern the scope of the Court's review. *See Penry v. Johnson,* 532 U.S. 782, 791 (2001).

Petitioner is serving a life sentence plus two years, imposed by the Kent County Circuit Court on November 29, 1993, after a jury convicted Petitioner of second-degree murder, Mich. COMP. LAWS § 750.317, and possession of a firearm during the commission of a felony, MICH. COMP. LAWS § 750.227b. In his pro se petition, Petitioner raises twelve grounds for relief, as follows:

I. PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION WHERE HE WAS TRIED BEFORE AN ALL-WHITE JURY AND THERE WAS SYSTEMATIC UNDERREPRE-

SENTATION OF AFRICAN-AMERICANS ON KENT COUNTY JURIES IN 1992-1993.

II. THE TRIAL COURT IMPROPERLY AND UNCONSTITUTIONALLY EXCLUDED RELEVANT AND ADMISSIBLE EVIDENCE OF A WITNESS'S KNOWLEDGE OF A POLICE THREAT AGAINST HER SISTER.

III HE TRIAL COURT IMPROPERLY AND UNCONSTITUTIONALLY EXCLUDED RELEVANT AND ADMISSIBLE EVIDENCE THAT ROBERT GLASS ADMITTED TO COMMUTING THE SHOOTING.

IV. THE PROSECUTOR IMPROPERLY AND UNCONSTITUTIONALLY ACTED AS A WITNESS BY CHALLENGING WITNESSES ON THE BASIS OF WHAT THEY ALLEGEDLY HAD TOLD THE PROSECUTOR.

V. THE PROSECUTOR IMPROPERLY AND UNCONSTITUTIONALLY INTRODUCED GRAND JURY TESTIMONY AGAINST PETITIONER WHICH WAS NEVER SUBJECT TO CROSS-EXAMINATION.

VI. THE TRIAL COURT IMPROPERLY AND UNCONSTITUTIONALLY EXCLUDED QUESTIONING OF ONE WITNESS ABOUT WHETHER ANOTHER WITNESS WAS IN A POSITION TO SEE A PARTICULAR EVENT.

VII. ADMISSION OF TESTIMONY OF OFFICERS AS TO WHAT OTHERS TOLD THEM, OR WHAT THEY "ASCERTAINED" FROM WHAT OTHERS TOLD THEM, VIOLATED THE RIGHT OF CONFRONTATION.

VIII. IMPROPER AND UNCONSTITUTIONAL ARGUMENT BY THE PROSECUTOR UNFAIRLY PREJUDICED THE PETITIONER.

IX. THE LINEUP WAS UNDULY SUGGESTIVE.

X. THE PROSECUTOR IMPROPERLY HAD HIS WITNESS TESTIFY TO MEETING THE PETITIONER IN JAIL

XI. COUNSEL WAS INEFFECTIVE BECAUSE OF HIS MANNER OF CONDUCTING THE JURY OBJECTION, FAILURE TO INVESTIGATE, FAILURE TO MAKE APPROPRIATE MOTIONS, AND FAILURE TO ASK RELEVANT QUESTIONS AT TRIAL.

XII. INEFFECTIVE ASSISTANCE OF COUNSEL AND OTHER SENTENCING ERRORS REQUIRE RESENTENCING.

Respondent has filed an answer to the petition (dkt # 17) stating that the grounds should be denied because they are either noncognizable, procedurally defaulted, or without merit. Upon review and applying the AEDPA standards, I find that Petitioner's claims are either procedurally defaulted, without merit, or not cognizable on habeas review. Accordingly, I recommend that the petition be denied.

Procedural History

A. Trial Court Proceedings

The state prosecution arose from the shooting of Christopher Rumbley at So-So's Bar in Grand Rapids in the early morning hours of November 7, 1991. Petitioner was charged with open murder and possession of a firearm during the commission of a

felony. He also was charged with assault with intent to murder against Naeem Wahid, together with a second count of felony-fiream for that offense. An initial preliminary hearing was held February 24, 1992. On May 29, 1992, the prosecutor filed a *Nolle Prosequi.* After grand jury proceedings, a new preliminary examination was held on April 1, 1993, and Petitioner was bound over on all charges. Petitioner was tried before a jury beginning September 13, 1993, and concluding on October 5, 1993. After four days of deliberations, the jury returned a verdict convicting Petitioner of second-degree murder and one count of felony-firearm. Petitioner was found not guilty of the charge of assault with intent to commit murder and the second count of felony-firearm. (Tr. XII, 1733-37.)[1]

Before the jury was sworn, defense counsel objected to the jury on the grounds that the jury array violated his rights under the equal protection clause. Counsel based his argument on the fact that the venire of sixty jurors included only two or three potential black jurors. The trial court rejected Petitioner's claim, holding that the same procedures for jury venire selection had been used by Kent County for many years. (Tr. I, 148-51.)

Thirty-seven witnesses testified at trial, with significant variations in descriptions and identifications. Because of the variations in the events presented by witnesses at trial, I will discuss each witness' testimony in turn.

The first witness was Willie McIntosh, a bouncer at So-So's Bar McIntosh testified that November 6, 1991, was Ladies Night at So-So's, when

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[1] Trial transcripts have labeled by the court reporter as Volumes I to XII and shall be referred to hereafter as "Tr. [Volume Number], [page number]."

women are admitted free of charge. The bar was crowded, with about 300 people present. As they came in the door, bar patrons were screened for weapons with a hand-held metal detector. (Tr. II, 172-74.) As McIntosh was standing near the rear of the bar, he became aware of a commotion, and he and Naeem:Wahid (also known as Jimmy Davis) turned to go towards the fight. The crowd began to run, and Wahid and McIntosh approached the fight from different directions. When McIntosh got near Wahid, Wahid shouted "Look out, they got a gun." (Tr. II, 176-77.) McIntosh looked over his shoulder and saw an arm raised, holding a gun. The arm was covered with the sleeve of a dark jacket with red and white on it. (Tr. II, 177.) McIntosh jumped behind a table. (Tr. II, 178.) Just after he heard Wahid shout, he heard Wahid get shot, followed by about three other shots. (Tr. II, 180-81.) About ten or 15 seconds later, McIntosh saw Christopher Rumbley lying on the floor. (Tr. II, 181-82.) On cross-examination, McIntosh testified that men entering the bar had the metal-detector wand passed over their bodies. Women, however, only had their purses scanned. (Tr. 189.) McIntosh testified that he did not see Petitioner in So-So's that evening and he did not see him with a gun. (Tr. II, 203-04). McIntosh also testified that he knew a man named Rod Fee, who looks very similar to Petitioner, though he was not sure whether Fee was in the bar on the night of the shooting. (Tr. 205-06.)

Katherine Brown testified that she had come to So-So's on the evening in question with her sister, Dorothy Brown, and a friend, Tonya Griver. The three went to the back of the bar (Tr. II, 213.) They stood and talked with Petitioner and a friend of his. (Tr. II, 215.) Katherine had never met Petitioner before that evening, and her sister introduced him as "Baby D." (Tr. II, 216.) Katherine testified that Petitioner was wearing a blue and red jogging suit and that he had

shoulder length hair at the time. (Tr. II, 220-21.) Petitioner's friend was wearing a blue jogging suit and had short hair. (Tr. II, 222-23.)

Katherine Brown testified that she heard two shots that evening, the first of which she did not witness. (Tr. II, 228.) As Katherine and Dorothy Brown were standing near Petitioner, a fight broke out between Petitioner's friend and another man. (Tr. II, 217.) Petitioner went over and began to assist his friend in fighting the other man, whom she identified as the victim, Christopher Rumbley. (Tr. II, 218-19.) According to Katherine, Petitioner grabbed the shirt collar of the victim and then shot him. (Tr. II, 219.) Katherine Brown testified that Petitioner was three to five feet from the victim at the time of the shooting. (Tr. II, 220.) She was standing 20 to 25 feet from Petitioner at the time. Following the shooting, Petitioner and his friend left by the front door. When Katherine and Dorothy Brown left the bar shortly thereafter, they saw Petitioner driving a green car out of the alley at the back of So-So's. (Tr. II, 222-24.)

Katherine Brown acknowledged that on January 19, 1992, she attended a lineup at the Kent County Jail, where she did not identify either Petitioner or anyone else. (Tr. II, 225-26.) At trial, she testified that while she had seen Petitioner, she did not really understand the question asked of her at that time. She also testified that she did not really recognize Petitioner. (Tr. II, 226.) Between the time of the incident and the lineup, Petitioner had cut his long hair and was virtually bald. Katherine Brown identified Petitioner at trial as Number 4 in the lineup picture. (Tr. II, 226-27.) She also identified Petitioner at the preliminary examination. (Tr. II, 228.)

On cross-examination, Katherine Brown acknowledged that at the preliminary examination she

stated that she did not actually see the gun, and she again stated at trial that she did not see the gun. (Tr. II, 234-35, 251.) She also acknowledged that the lighting was low, that she had been in the bar drinking for a couple of hours, and that there were four to six people between her and the fight. (Tr. II, 236, 240-41.) In addition, cross-examination revealed that she had not identified Petitioner until after learning that her sister had identified him in the lineup. (Tr. II, 249-50, 254-55.) She also acknowledged that the person she identified as Petitioner held the victim by the collar and was struggling with him, and that numerous other people were near the victim at the time of the shooting. (Tr. II, 259-60.) On redirect, Katherine testified that she saw Petitioner shoot the victim. Her testimony regarding not seeing the gun meant that she did not see Petitioner hold it up. She only saw him shoot it. (Tr. II, 265-70.)

The next witness was trauma surgeon and emergency room physician, Dr. Eric George. Dr. George testified that at approximately 1:30 a.m. on November 7, 1991, he treated Naeem Wahid for a gunshot wound to his right thigh. He surgically removed the bullet and turned it over to the police. (Tr. II, 274-75.) He testified that, had the bullet lodged a centimeter deeper, it could have resulted in a devastating injury or death. (Tr. II, 276-77.) He testified that the bullet appeared to have entered on a trajectory that was roughly parallel to the ground. (Tr. II, 283-84.)

Dorothy Brown testified that she was at So-So's with her sister on the evening of the shooting. Dorothy met Petitioner at City Lights a week before the shooting, and she talked with him by phone two days later. (Tr. II, 287-88.) At City Lights, Petitioner was accompanied by several people, one of whom he introduced as his brother. (Tr. II, 288.) She knew

Petitioner by the name "Baby D." (Tr. II, 290.) Petitioner at that time had long hair styled in waves toward the back. (Tr. II, 290.)

Dorothy Brown testified that when she saw him at So-So's on November 6, 1991, Petitioner again was accompanied by the man he had introduced as his brother. (Tr. II, 289.) She and her sister talked with Petitioner and his brother. (Tr. II, 289.) At some point, Petitioner's brother began to argue with Christopher Rumbley. (Tr. II, 292.) Petitioner walked over to Rumbley and his brother. They all began arguing and a crowd formed around them. She could not see much because of the crowds. She heard a gunshot. When she looked, she saw Rumbley on the floor and Petitioner standing right over him. (Tr. II, 293-94.) As Petitioner and his brother left the bar, Dorothy Brown observed that both were holding guns. (Tr. II, 295, 302-03.) Approximately a minute later, Dorothy and Katherine Brown left the bar. (Tr. II, 297.) She saw Petitioner driving away in a green car, accompanied by his brother and two others. (Tr. II, 297-98.) Petitioner called Dorothy the next day, and she testified that she felt scared because of the shooting. (Tr. II, 299.) Dorothy identified Petitioner at a police lineup. (Tr. II, 300-01.) She testified that she did not see who shot Rumbley. (Tr. II, 317.) She also acknowledged on cross-examination that in February 2002 she had told Detective Lyzenga and had testified at the first preliminary examination that she did not see Petitioner with a gun. (Tr. II, 319, 326-27.)

Laura Dean testified that she arrived at So-So's with her friend Eva Price at about 9:00 p.m. on the night of the shooting. (Tr. III, 351.) She met up with a man she knew as Scarface, together with his cousin and friend. (TT. III, 353-54.) After a short period of time, the friend came up to Scarface and the next thing she knew, Scarface and his friend were involved

in a fight. Everyone had begun running and the scene had become confusing when a shot was fired. Dean saw shots coming from the direction of Scarface's cousin. (Tr. III, 356-57.) She described the cousin as being tall, light-skinned, with thick eyebrows, and "real pretty hair" that he wore pulled back in a ponytail. He was wearing a black hooded sweatshirt and a blue Duke starter jacket. (Tr. III, 357- 58.) Dean previously told police that she had seen Petitioner pull a gun and shoot it. She clarified at trial that she saw Petitioner pull a gun and that the shooting came from his direction, but she could not be sure Petitioner did the shooting. (Tr. III, 358-59.) She identified Petitioner at a lineup, though he looked quite different because he had cut his hair, and she again identified him at trial. (Tr. III, 359-60.) She testified on cross-examination that she could not be entirely sure of her identification and could not be confident if shown someone who looked similar. (Tr. III, 378-79.) She testified that she left the bar quickly after the shooting. She saw Petitioner, Scarface and others in a car, and she spoke with Scarface. (Tr. III, 363-64.) Two days later, while working at the Holiday Inn, she was given a message that someone wanted to see her in the swimming pool area. When she went down, she saw Scarface, Petitioner and the other person who had been in So-So's on the night of the shooting. She spoke briefly to Scarface, but never spoke with Petitioner.

Arthur Snyder testified that he was a prisoner security guard or turnkey working at the City of Grand Rapids Jail at the time of Petitioner's arrest on February 12, 1992. Snyder testified that when Detective Lyzenga brought Petitioner in, Snyder asked Petitioner whether he had been arrested in Grand Rapids before. Petitioner responded that he had never been in Grand Rapids before. (Tr. III, 404-05.)

The next witness was Ernest Watson. He testified that he had been in So-So's on the evening of the shooting. Watson stated that the fight broke out as he was at the front of the bar preparing to leave to drive someone home. (Tr. III, 414-15.) He saw the back of a man holding a gun. The man he saw had a "fade" haircut, with the hair cut very close on the sides and longer on top, standing up. (Tr. III, 425-26, 428.) Watson heard several shots and people falling, some of whom fell on him. (Tr. III, 415.) Watson testified that he attended a lineup, at which he picked another man. However, on his way home, he told the detective that he had picked the wrong person, and that the correct individual was Number 4, Petitioner. (Tr. III, 419, 431.) On cross-examination, he testified that other witnesses suggested to him at the station that the correct person was Number 4. (Tr. III, 423, 429.) Watson testified at trial that the person he saw with the gun was not Petitioner. (Tr. III, 426-27.)

Tonia Griver went to So-So's with Dorothy and Kathy Brown, but she did not stay with them in the bar all evening. (Tr. III, 431.) Dorothy Brown introduced her to Petitioner, calling him "Baby D." (Tr. III, 432.) Griver identified Petitioner at trial, but noted that he had longer hair at the time of the shooting. (Tr. III, 433.) Griver was on the dance floor at the time the fight began. She heard two shots, and she dove into the DJ booth for a few minutes. (Tr. III, 435-36.) She then came out and looked at the victim, whom she knew and had talked to earlier in the evening. (Tr. III, 436-37.) She went outside to find Dorothy and Kathy, then went back inside. She stayed in the bar with the victim's best friend, JB, trying to calm him down (Tr. III, 437-38.) She did not see the shooting or see anyone with a gun. (Tr. III, 439.) At the lineup, Griver picked Petitioner as someone who had been in the bar, but she testified that she did not see him do any shooting. (Tr. III, 444.)

Garlinda Bowman testified that she also was present at So-So's on the night of the shooting. She testified that she was at the next table from the fight. She heard a man say he had "nothing to do with that" and that he was leaving. (Tr. III, 450.) As he turned to go toward the front, he was hit by a man, and two more joined him, hitting, kicking and punching. (Tr. III, 450-51.) People began running and she heard someone yell, "He's got a gun." (Tr. III, 452.) She heard two shots, though she at first thought they were part of the music. (Tr. III, 452.) She saw no one with a gun that night. (Tr. III, 453.) She saw the body on the floor immediately after the shots. (Tr. III, 454.) At the lineup, Bowman identified no one because she was afraid they could see her. She told the detective on the way home that she recognized Number 4, Petitioner, as having been involved in the beating. (Tr. III, 457.)

Wilfred Joiner testified that he came to So-So's with Willie Johnson at about 11:00 p.m. on the evening of the shooting. He was on the dance floor when the fight broke out. (Tr. III, 480-81.) He saw between three and six people fighting, with one man being beaten up. (Tr. III, 482.) One man was beating the victim with the butt of a handgun. (Tr. III, 482, 494-95.) Joiner testified that he saw a man get shot and he heard five or six shots. (Tr. III, 485-86.) He testified that he was unable to identify any of the people involved. (Tr. III, 486.)

Sandra Buchanan testified that she went to So-So's with Tina Lyons. A fight broke out in the bar, and she heard people shout that someone had a gun. (Tr. 500-02.) She was fleeing toward the front of the bar when the shots broke out. She did not see the shooting or anyone with a gun. (Tr. III, 504.). She testified that one of the fighters looked like a man she knew, Rod Fee. She identified Petitioner as looking like Rod Fee. (Tr. III, 505-06.) She did not know whether the man

she saw was Rod Fee or Petitioner. (Tr. III, 506-07.) At the lineup, she identified Number 4 as looking like Rod Fee. (Tr. III, 508.) She stated that she had seen him around a number of times both before and after the incident. (Tr. III, 510-12.) During all of the time she has known him, Rod Fee has worn a ponytail. (Tr. III, 513.)

The next witness was Cheryl Butler. Shortly before midnight on the night of the shooting, she went to So-So's with Yvonne Brady and a friend of Yvonne's. (Tr. IV, 525.) Butler was near the men's bathroom when she heard arguing, but she paid no attention and moved to the back bar. She heard one shot fired, though people were saying four shots had been fired. (Tr. IV, 527.) She then saw a man walking who collapsed next to her and died. (Tr. IV, 527-28.) She identified Number 5 at the lineup as someone she had seen that night. She did not identify Petitioner in the lineup and she testified that she did not see him in the fight or with a gun that evening. (Tr. IV, 541.)

Randy Stewart testified that he went to So-So's shortly between 11:00 p.m. and 12:00 a.m. on November 6, 1991. He talked with Dorothy Brown, and while they were dancing, Dorothy introduced him to the victim, Chris Rumbley. (Tr. IV, 546-47.) Later, he saw a fight begin between three men. One hit another in the face with a glass. (Tr. IV, 548.) Stewart moved away toward the dance floor, when he heard someone say, "He's got a gun." (Tr. IV, 548.) He tripped over a chair and heard two gunshots. (Tr. IV, 549.) He remembered one of the men involved in the fight because he had bumped into him earlier, describing him as 6' 2", 220 pounds, wearing a black leather jacket and having a short haircut. (Tr. 551, 559.) Stewart testified that he had never seen Petitioner before. (Tr. IV, 560.)

Frank Sallie testified that he also was in So-So's Bar on the night of the shooting. While he was talking with friends, a fight erupted, in which chairs were overturned, glasses flew and two or three shots were fired. (Tr. IV, 569.) Several men were beating up another man. One seemed to be 6'1", weighing 210-220 pounds. (Tr. 571-72.) He saw the person being shot and he saw fire coming from the gun, but could not identify who fired the shot, though he knows he had short cut hair. (Tr. IV, 576-77, 588.) He identified Number Two at the lineup as someone who had been in the bar. (Tr. IV, 578.)

Fred Parks testified that he had been to So-So's many times and that he was there with four friends on the night of the shooting. Parks stood near the DJ booth, as was his usual practice. (Tr. IV, 590-91.) He became aware of a fight taking place, and he moved to the farthest chair from the fight. (Tr. IV, 592-93.) He saw a number of people moving and then he heard three or four shots. (Tr. IV, 594.) Parks did not see the victim, the shooter or anyone involved in the fight. (Tr. IV, 596.) He attended a lineup at which he identified Number 4 as someone who was in the bar on the night of the shooting. (Tr. IV, 598.) He testified that Petitioner had been wearing a blue Detroit Piston's starter jacket that had some red and white on it. (Tr. IV, 598.)

Eva Price testified that she went to So-So's at about 10:30 p.m. in the company of Laura Dean. They stayed close to the front of the bar, near the women' restroom. (Tr. IV, 608.) She saw a man with a blue starter jacket and a blue baseball hat with a ponytail in back pull a handgun out of his jacket and fire two or three times. (Tr. IV, 608, 615-16.) At the lineup, she identified Petitioner as the man with the gun. (Tr. IV, 619.) Three days after the lineup, however, she saw the person who did the shooting driving a burgundy

car, and he still had the long hair and deep eyebrows. (Tr. IV, 620.) She told police that the person she identified at the lineup was not the shooter, though he looked quite similar. (Tr. IV, 622, 628.) She also testified that the bouncers were not using a metal detector on everyone that evening, only screening those they did not know and not screening women. (Tr. IV, 622-23.) Price also knew Dorothy Brown, and Dorothy introduced her to the person who did the shooting, who was not Petitioner. Dorothy Brown told Price that his name was "Rafael" or "Raffee" and that he was her man. (Tr. IV, 623 627; Tr. VIII, 1179-81.) She testified that she saw "Raffee" again in the lobby of the courthouse on the day of Petitioner's preliminary examination. (Tr. IV, 626.) She since has seen him at a gas station at the corner of Franklin and Eastern. (Tr. IV, 627.) Price testified that until shortly before the shooting, Dorothy Brown's purse was flat, like it contained little. A short time before the shooting, Brown left the bar, returning with something in her purse. (Tr. IV, 628-29.)

Anthony Keith Jones, also known by friends as "Scarface," testified that he had been a friend of Petitioner's for a year or two. He, Petitioner, Robert Glass and Rolando Lesley went to So-So's on the night of the shooting. Jones testified that Petitioner's nickname was "D." (Tr. IV, 640.) The four traveled from Battle Creek in Petitioner's blue car. (Tr. IV, 637-38.) Jones saw Laura Dean and spoke with her. As he stood near the dance floor, he saw a man named "Way Out" standing on top of a table. "Way Out" struck the deceased in the face with a glass. (Tr. IV, 639.) A fight broke out and Petitioner, Glass and Lesley tried to break it up, but could not, (Tr. IV, 640, 642-43.) Jones began heading toward the front bar. He saw "Way Out" reach for something at his waist. (Tr. IV, 667.) He saw the deceased run away from the fight and get shot. He did not see the shooter, but the shots were

fired a couple of seconds after he saw "Way Out" reach for his waist. (Tr. IV, 667.) The shots came from the rear of the bar, where "Way Out" was. Jones believed that "Way Out" was the person who fired the shots (Tr. IV, 670-71) At time the victim was shot, Petitioner was near the front of the bar. (Tr. IV, 655-56.) Jones saw Petitioner and Lesley going out the door, and he ran behind them. (Tr. IV, 640.) After they left the bar, the four went to the Holiday Inn and spent the night. (Tr. IV, 647.) Jones denied seeing Laura Dean at the Holiday Inn after the shooting. Instead, he saw her at a different Holiday Inn a couple of weeks before the shooting. (Tr. IV, 648-49.) Jones described Petitioner's hair as being long and combed back in waves, never in a ponytail. (Tr. IV, 659-60.)

Dr. Steven Cohle, an expert in forensic pathology testified regarding his post-mortem examination of Christopher Rumbley. Cohle testified that Rumbley had numerous external scrapes on his left forearm and wrist, the top of the left shoulder, and the left thigh. He also had a cut near the hairline extending to the skull and an injury to the top of the head caused by a heavy blow with a weapon such as the butt of a heavy gun, a baseball bat, a heavy bottle, or some similar object. In addition he had a gunshot wound entering the right chest that passed through the heart and other vital organs. (Tr. V, 694-95, 699.) Rumbley bled to death from the gunshot wound, probably within about three minutes. (Tr. V, 696.) Because no powder burns appeared on the skin and because of the angle of trajectory, Rumbley had to have been shot at a distance of more than four feet, and either the assailant had to have been standing on a table or the victim had to have been bent forward at a significant angle. (Tr. V, 695, 702-03.) Rumbley also had numerous old scars consistent with a history of fighting. (Tr. V, 709.) Cohle testified that if an assailant had been holding the collar of the victim's

shirt while firing a gun, gunpowder or soot residue would have been expected. (Tr. V, 711-12.)

Crime scene technician Kathy Zemaitis testified that she arrived at the scene at approximately 1:00 a.m. on the morning of November 7, 1991, just as the body was being removed. (Tr. V, 715.) She testified to the location of the body and of a cartridge casing, a fired bullet and a fully loaded fifteen-cartridge clip. (Tr. V, 719-21.) No fingerprints were recovered from the physical evidence. (Tr. V, 730; Tr. VI, 850-51.)

Michigan State Police officer Gary Truszkowski testified as an expert in firearms and identification. (Tr. V, 735.) Both the fired bullet and the cartridge case were from a nine millimeter semiautomatic pistol. (Tr. V, 736-37.) He could not identify the manufacturer of the weapon that fired the cartridge. (Tr. V, 739.) The cartridges in the magazine clip came from several different cartridge manufacturers. (Tr. V, 740-41.) The magazine itself was from a Ruger P-85. (Tr. V, 742, 746-47.) Truszkowski testified that he could not determine where the gun was discharged from where the cartridge case was found. (Tr. V, 743-44.)

Crime scene technician Sheila Hynes briefly testified,. essentially corroborating the testimony of the other crime scene technician, Kathy Zemaitis. (Tr. VI, 751-61.) Grand Rapids police officer Glen Bailey testified that he and his partner, Steve LeBreque, arrived at the scene less than one minute after receiving a dispatch call shortly after 1:00 a.m. on November 7, 1991. (Tr. VI, 776.) Bailey spoke with between five and fifteen witnesses, The witnesses generally were uncooperative, and they avoided questioning by leaving. (Tr. VI, 778.) Bailey attempted-first aid but the victim appeared dead. (Tr. VI, 778-79.) Bailey testified that he put the

ammunition clip back where witness Mack reported finding it. (Tr. VI, 780.)

Jimmy Mack testified that he was a regular customer at So-So's and was present on the night of the killing. Patrons were checked for weapons at the door. (Tr. VI, 784-85.) He was dancing in the middle of the dance floor when he heard fighting or arguing, followed by gunshots. (Tr. VI, 785-86.) He testified that the bullets came from the hallway area and came past him (Tr. VI, 800-801.) Mack then dove under a table. (Tr. VI, 787.) He saw the victim who had been shot in the leg and heard him say he had been hit. (Tr. VI, 787.) After he got up, Mack walked around picking up money and things from the floor. He found the ammunition clip under a napkin and gave it to a police officer, upon the officer's request. Mack watched the police officer put the clip in the same place Mack told him he had found it. (Tr. VI, 791-92.) Mack attended the lineup but did not identify Petitioner. (Tr. VI, 797.)

Robert Glass testified that he, Petitioner, "Tone" [Anthony Jones or "Scarface"] and "Sean" drove to So-So's on November 6, 1991. (Tr. VI, 812-14.) Glass testified that he and Petitioner, nicknamed "D," were best friends. (Tr. VI, 813.) According to Glass, Petitioner wore his hair longish, in a wave going back, but he never pulled it into a ponytail in all the time Glass had known him. (Tr. VI, 817-18.) Glass testified that a drunk man began to argue with a man Glass knew as "Way Out," beginning a fight. (Tr. VI, 820-21). He, Petitioner, Tone and Sean approached the fight. (Tr. VI, 830-31.) When the shooting began, Glass, Petitioner and others ran out of the bar. (Tr. VI, 821.) Glass was the first out and Petitioner was last. (Tr. VI, 833.) At trial, Glass could not remember what he and Petitioner were wearing, though he testified before the grand jury that Petitioner was wearing a dark blue Piston's starter jacket and matching cap. (Tr. VI, 834-

37.) He testified that Petitioner was not involved in the fight, that he did not see Petitioner with a gun that night, and that he did not see Petitioner shoot anyone. (Tr. VI, 841.)

Rachel France testified that she went to So-So's at about 10:30 p.m. on November 6, 1991, together with her sister Tammy, Loquita Delridge, Cutina Edwards and Patricia Durr. (Tr. VI, 852, 865.) France was on the dance floor when a fight broke out. (Tr. VI, 853-55.) She left the dance floor, thinking the fight involved her friends, Before she got to the fight, she heard two or three shots fired. (Tr. VI, 857, 859.) She did not see who was involved in the fight. (Tr. VI, 859.) After the shots, her cousin pulled her to the floor. She got back up and saw people running for the door and a man lying on the floor. (Tr. 860.) She saw no one with a gun. (Tr. VI, 861.) She attended the lineup, but could recognize no one. (Tr. VI, 861.)

Tammy France testified that she went to So-So's with her sister and a number of others on November 6, 1991. (Tr. VI, 873.) She was by the back door when the fight broke out. She saw a number of people watching the fight and then heard a couple of shots. (Tr. VI, 875-76.) She saw someone wearing a long, black, leather coat run out the door at a time people were saying, "There they go running out the door." (Tr. VT, 880.) She attended the lineup, but was unable to identify anyone. (Tr. VT, 879.)

Rolando DeSean Lesley, nicknamed "Sean," testified that he, Anthony Jones, Robert Glass and Petitioner, nicknamed "D," went to So-So's on the night in question. (Tr. VI, 888-89.) He saw a person known to him as "Way Out" in a fight with another man. (Tr. VI, 896.) He was standing near Jones, Glass and Petitioner, but he and Jones were closer to the fight (Tr. VI, 901.) Lesley testified that he saw "Way

Out" hit the other person with an object that he assumed was a gun. They fell to the floor and "Way Out" hit him again. He moved away from the fight and heard shots. (Tr. VI, 900, 915-16.) He then ran out of the club. (Tr. VI, 900.) At the time of the incident, Petitioner wore his hair somewhat long and waved to the back. He never saw Petitioner with his hair pulled back into a ponytail. (Tr. VI, 902-04.) He never heard anyone call Petitioner "Baby D." (Tr. VI, 917.)

Sheilita Cox testified that she went to So-So's at about 11:30p.m. (Tr. VI, 921.) She was sitting in a booth by the wall with Frank Sallie. (Tr. VI, 923, 933.) She heard a loud noise and realized that there was a fight. She saw hands going up and down and a person being beaten. She then saw a hand come up with a gun. She testified that she "yelled out that they have a gun." (Tr. VI, 926.) She was trying to run when she heard gunshots. (Tr. VI, 926.) She believed that at least two or three people were beating the victim, (Tr. VI, 927.) She attended the lineup, but was unable to identify anyone. (Tr. VI, 932.)

Jamesia Robinson testified that she went to So-So's with her two cousins, Phillip Johnson and Barbara Keith. (Tr. VI, 938.) She was near the fight when it broke out, and she saw what looked like four people involved. (Tr. VI, 942-43.) She wanted to leave, but she could not get past the fight. Someone told her to get down and she got under a table. Then she heard three shots. (Tr. VI, 943-45.)

Cutina Edwards testified that she went to the bar with Diane Watson and her brother Ernest Watson. (Tr. VII, 956.) She was on the dance floor when she became aware of three people fighting. (Tr. VII, 957.) She did not know the participants, but two of those involved were wearing long, black, leather coats and black cotton stocking caps. (Tr. VII, 958-59,

969.) They knocked over tables and people began to crowd around. (Tr. VII, 961.) She heard three gunshots, and she began to run toward the bathroom. (Tr. VII, 962-63.) She could not identify anyone at the lineup. (Tr. VII, 963.)

Rochelle Edwards testified that on November 6, 1991, she went to So-So's with Carrie McIntosh and Claudette Bryan. She was not checked for weapons when she arrived at about 11:00 p.m. (Tr. VII, 975.) She stood, as usual, by the second bar in the back. (Tr. VII, 976.) She was in the hallway when the fight broke out. (Tr. VII, 978-79.) She told her friends that two men were fighting, and then she heard someone yell that he had a gun. She ran to the front door, and she was going out the door when she heard the shots. (Tr. VII, 979-80.) She could not identify anyone involved in the fight. (Tr. VII, 986-87.)

Vonya Ware went to So-So's near closing time, 2:00 a.m. She asked the man at the door to page Conte. As she stood there, everyone ran to the front of the bar. She heard two shots and she ran by the pool table and went under the bar. (Tr. VII, 989, 992-93.) She did not see any guns that night and was unable to identify anyone at the lineup as having a gun. (Tr. VII, 994.) She did, however, identify Petitioner as being at the bar that night. (Tr. VII. 996.)

Shawnetta Chinn went to So-So's with her boyfriend, Michael Hernandez, at about 1:00 am. (Tr. VII, 1005.) Within fifteen minutes after she arrived, she saw the victim in a fight with two men, right in front of her table. (Tr. VII, 1005.) Eventually, about five or six men joined the fight. (Tr. VII, 1007.) After they had been fighting, a man dressed in a bright colored jacket held up a gun. She then heard three or four shots. (Tr. VII, 1005-06, 1009-10.) After she heard the shots, she got to the floor. (Tr. VII, 1012.) Because

of the dark conditions, she could not identify anyone involved in the fight except the victim, Chris Rumbley. (Tr. VII, 1017.)

Grand Rapids Police Officer Bruce Weaver testified that he responded within a few seconds to a call received at approximately 1:05 am. on November 7, 1991, directing him to a large disturbance at So-So's. (Tr. VII, 1023-24.) When he arrived, approximately 40 or 50 people were outside the bar and leaving the area. (Tr. VII, 1023, 1028.) He was instructed by Lieutenant Fox to keep people inside the bar as much as possible and to take names. Individuals who would not give names and addresses would not be allowed to leave. He stood at one side of the entrance and Officer Tim Moore stood at the other side. Both took names and addresses. (Tr. VII, 1024.)

The next witness to testify was Patsy Price, a regular patron at So-So's. Price testified that she was at So-So's with her ex-boyfriend, Tony Hardin. (Tr. VII, 1030-31.) About three hours after she got to So-So's, she was sitting in front of the dance floor when she saw two men begin arguing. (Tr. VII, 1032, 1038.) She also saw two women beginning to argue. She began to dance, and approximately ten minutes later she heard gunshots. (Tr. VII, 1035.) She and her boyfriend got down on the floor. (Tr. VII, 1035-36.) She could not identify the men who were fighting. (Tr. VII, 1034.)

Dorothy Brown was recalled to the stand. She testified that she first met Rod Fee sometime in early 1992. (Tr. VII, 1059.) She seen him on numerous occasions after the shooting, but never at So-So's (Tr. VII, 1056, 1060.) She acknowledged that Fee was similar in appearance to Petitioner, but she could easily tell the difference. She stated that the man she saw in So-So's on the night of the incident was

Petitioner, not Rod Fee. Brown testified that she had never had any substantial relationship with Fee. (Tr. VII, 1056-58.)

Rod Fee testified that he was not at So-So's on the night of the shooting, though he had been at the bar on other occasions. (Tr. VII, 1066.) He was riding in a cab past So-So's on November 7, 1991, and saw the police in front of the bar. (Tr. VII, 1067.) During the week preceding his testimony, Fee became aware from an ex-girifriend that the police were looking for him. (Tr. VII, 1067,) He spoke with police, explaining his whereabouts on the night of the shooting. (Tr. VII, 1068-69.) Fee testified that he had spent much of the evening at his girlfriend, Rebecca White's, house. He called a cab to go to So-So's. When he saw the police in front of So-So's, he went to another bar, Pazzazz. When he got to Pazzazz, he learned there had been a shooting at So So's. (Tr. VII, 1069.) Fee stated that he did not know Petitioner, but he had seen him a couple of times at Pazzazz and in jail in May 1992. Others had commented to him that he and Petitioner looked like twins. (Tr. VII, 1071-73.) Fee testified that he had worn his hair in a pony tail since approximately 1986. (Tr. VII, 1075.) He stated that he had never had more than casual conversation with Dorothy Brown. (VII, 1074-75.)

Patricia Durr testified that she wasn't wearing her glasses and was unable to recognize anyone. (Tr. VII, 1107-1117.) She could not identify anyone involved in the incident at the lineup, though she did identify Petitioner as someone she otherwise recognized. (Tr. VII, 1115-16.) She stated that after the shooting a man wearing a black coat, who had earlier danced with Rachel France, passed the gun to another. (Tr. VII, 1119-20.)

Lester Barnett testified that he was on the dance floor at the time of the shooting. (Tr. VII, 1125.) He heard the argument between the victim and three other men. (Tr. VII, 1128.) He saw a man's hand come down with a gun and heard a shot. (Tr. VII, 1128.) He heard a total of three shots, but never saw the face of the shooter. (Tr. VII, 1132-33.) The shooter was over six feet tall, wearing a light-colored long shirt, and with closely cropped hair, or hair that was pulled back. (Tr. VII, 1131-32.)

Lawrence Woods testified that he was the door man and bouncer at So-So's on the night of the shooting, He used a metal detector to check all men, and more briefly checked women, looking into their purses. (Tr. VII, 1137-38.) Woods testified that he knew Rod Fee well as a regular patron of So-So's, but he did not know if Fee was in the bar on the evening of the shooting. (Tr. VII, 1145-46.)

Gary Naves testified that he saw a six-foot-tall man with wavy hair and wearing a blue and red Pistons jacket run toward him immediately after the shots were fired. (Tr. VIII, 1165-66.) He identified Petitioner both in the lineup and in court as looking similar to the man he saw running. (Tr. VIII, 1168-69.) At the time of the shooting, however, he thought he saw Rod Fee, and he could not be certain at trial whether it was Petitioner or Rod Fee. (Tr. VIII, 1171-73.)

Latonia Thrash testified that she had known Petitioner all her life and lived around the corner from him. (Tr. VIII, 1182-82.) She reported that some period of years before the trial, Petitioner wore his hair in a "tail," which she described as a small braid in the back, which she distinguished from a ponytail. (Tr. VIII, 1188-89.) She stated that she could not be sure if

he wore it that way at the time of the shooting, but she believed so, (Tr. VIII, 1189-90.)

John Dent testified that he had known Petitioner since 1988, According to Dent, a couple of days after the shooting, Petitioner told Dent he was being sought after for a murder he did not commit. Petitioner told Dent that he had argued with a guy and had left the bar to go to the car. When he left, he intended to shoot the guy. (Tr. VIII, 1198-99.) At that time, two men named "Yankee" and "Vamp" persuaded him not to shoot the man because he was in enough trouble, Instead, Yankee got a girl to go in to lure the man outside and Yankee shot him. (Tr. VIII, 1200.) At the time, Petitioner had relatively short hair with a short braid in the back. Yankee had the same haircut. (Tr. VIII, 1214, 1218.) Dent testified that he also had met Rod Fee, who looked like Petitioner. (Tr. VIII, 1215-16.)

Battle Creek Police Officer Timothy Hurtt testified that he had known Diapolis Smith since 1985, and he had seen him on numerous occasions since then. (Tr. VIII, 1222) Before the summer of 1992, Petitioner wore his hair three to four inches long. After the summer of 1992, he had a short cut with a small tail in the back. (Tr. VIII, 1222-23.) Hurrt testified that he also knew Robert Glass, known as "Yankee." Glass always had closely cut hair, and at no time had long hair or a tail. (Tr. VIII, 1224-25.)

Willie Johnson testified that he was talking to Angie McIntosh when he saw a fight breakout. One man started arguing with another man sitting about ten or twelve feet away. Shortly thereafter, five or six others joined the fight. Johnson saw a pistol being pulled up and turned to leave. (Tr. VIII, 1228-29.) He could not recognize anyone involved, but some of the men had short leather coats and one had a long black

trench coat. (Tr. VIII, 1229.) He heard three shots as he was approaching the second bar. (Fr. VIII, 1234.)

Anesia Jones testified that she saw a fight break out about fifteen feet away from her. The fight involved a number of people. (Tr. VIII, 1248.) She saw a hand go up with a gun and then saw two flashes. She ran toward the back door, attempting to leave. She recalled that the shooter was brown skinned, heavy set and wearing a red baseball cap with gold writing. (Tr. VII, 1250, 1252.)

The prosecution introduced the testimony of Florence Davis, the operator of the Veterans Transportation Company. Davis testified about the records of cab calls from 4:00p.m. on November 6, 1991 to 4:00 am, on November 7, 1991. The records showed that sometime within the twelve hour period, a cab picked up a rider at the address described by Rod Fee. (Tr. IX, 1260-62, 1266.) Veterans cab driver Karry Roland testified that, while drivers keep records of their fares, he no longer had the records from November 6-7, 1991. (Tr. IX, 1269.)

Naeem Wahid testified that he arrived at So-So's, where he worked as a bouncer, at 10:00 p.m. on the night of the shooting. When he heard the fight begin, he moved from the back of the bar toward the fight. He saw a bunch of people jumping on one person. He began trying to separate the fighters. He pulled one man off the fight. (Tr. IX, 1271-73.) As he turned, he saw a gun being swung downward, as if to strike someone. He yelled out, "He got a gun." (Tr. IX, 1274-75.) He was right next to the person and identified Petitioner as the person with the gun. (Tr. IX, 1275-76.) Wahid yelled out the warning about the gun and dove away from Petitioner. As he did so, he was struck with a bullet in the leg. (Tr. IX, 1277.) He described the gun as being black with white or gray on the side.

He saw only the one gun that night. (Tr. IX, 1277.) He described Petitioner as wearing a blue sports jacket with red writing on the back and wearing his hair slicked back with a ponytail. (Tr. IX, 1278.) He identified Petitioner at the lineup and at trial. (Tr. IX, 1279.) Wahid testified that he knew Rod Fee, that he had seen him on five or six occasions and that he easily could tell them apart. (Tr. IX, 1281.) He testified, however, that he did not know if Fee was at So-So's on the night of the shooting. (Tr. IX, 1283.) Wahid could not identify any other person involved in the fight and had no memory of what people were wearing. (Tr. IX, 1286,. 1288.)

Anthony Hardin testified that he knew Chris Rumbley and saw him argue with Petitioner and then separate. (Tr. IX, 1310-11.) Hardin danced for awhile, mingled and spoke with various people. (Tr. IX, 1311.) He was speaking with his sister when he noticed Rumbley and Petitioner arguing again. He saw Petitioner hit Rumbley over the head with a gun. (Tr. IX, 1312.) Rumbley tried to come back at Petitioner and a friend of Petitioner's appeared to pull him back. (Tr. IX, 1313.) Various other people came over and began yelling, and Hardin could not see who was striking whom. (Tr. IX, 1312-13.) Hardin then saw Petitioner point the gun at Rumbley's midsection and fire it. (Tr. IX, 1313.) Hardin, his sister, Leonora Jones, and Patsy Price all dropped to the floor. (Tr. IX, 1314.) Hardin heard additional shots, but he does not know how many. (Tr. IX, 1314.) He had noticed Petitioner earlier in the evening when his sister and her friends commented that Petitioner was nice looking and that they would like to meet him. (Tr. IX, 1317.) Hardin testified that Petitioner's hair was combed back into a braid. (Tr. IX, 1318-19.) He identified Petitioner at the lineup as well as at trial. (Tr. IX, 1324.) Hardin testified that the shooter was wearing a full-length coat. (Tr. IX, 1345.)

Leonora Jones testified that she was with her brother and Patsy Price at So-So's on the evening of the shooting. (Tr. IX, 1366.) She noticed Petitioner and some other men because Petitioner was good looking and had nice hair, drawn back into a pony tail, (Tr. IX, 1366, 1371.) Petitioner was wearing a gray sweatshirt with a hood, covered by a white or gray jacket. (Tr. IX, 1372.) The men did not arrive until a short time before they began to fight with Chris Rumbley. (Tr. IX, 1366-67.) She saw Rumbley hit with bottles and saw Petitioner hit him with a gun. Less than a minute after she saw the gun, she heard a shot. Her brother then pulled her to the floor, (Tr. IX, 1368.) She testified that Petitioner appeared to leave the bar and then come back shooting. (Tr. IX, 1377-78.) She identified Petitioner as the shooter both at the lineup and at trial. (Tr. IX, 1379.)

Grand Rapids Police Detective Thomas Lyzenga testified that he was the chief investigator of the shooting at So-So's. (Tr. X, 1414-15.) He responded to the scene after being awakened by officers sometime after 1:00 a.m. (Tr. X, 1416.) When he interviewed Tonya Griver, Katherine Brown and Dorothy Brown on January 22, 1992, he first heard the name "Baby D." (Tr. X, 1418.) He never heard the name "Rod Fee" until trial. (Tr. X, 1420.) He had heard Miss Price say the name "Roffee" before. (Tr. X, 1420.) Lyzenga testified that he never found the weapon and that it was not possible to track a particular Ruger P85 from the clip, the cartridge ease or the spent bullets. (Tr. X, 1427-28.) At the time Petitioner was booked for the shooting, February 12, 1992, he had long, straight hair. Six days later, at the arraignment, he had shaved his hair down to the skin. (Tr. X, 1430-31.) On July16, 1992, Lyzenga heard the name "Way Out" for the first time from defense counsel. The name came up again on July 23, 1992 at the grand jury proceedings through witnesses Robert Glass, Rolando Lesley and Anthony

Jones. (Tr. X, 1438, 1442.) Lyzenga testified that he explored all records, interviewed officers and posted notices, seeking information about an individual named "Way Out"." He found no information about such an individual. (Tr. X, 1442-43.) Lyzenga introduced the identification cards from the witnesses identify Petitioner at the lineup. (Tr. X, 1447-49.) Defense counsel cross-examined Lyzenga regarding threats he made to Katherine Brown regarding her sister Dorothy Brown's potential to be charged as an accessory after the fact if she continued to be uncooperative in identifying Petitioner. (Tr. X, 1464-1468.) Lyzenga acknowledged that Katherine Brown had not identified Petitioner at the lineup. (Tr. X, 1468.) He also acknowledged that police had not heard the name Anthony Hardin until several months into the investigation. (Tr. X, 1472, 1476.)

Grand Rapid Police Detective Kenneth Kooistra testified that after failing to identify Petitioner at the lineup, and while he was being driven home, Ernest Watson told Kooistra that he had recognized Petitioner as the shooter because of the back of his head. (Tr. X, 1478-79.) Officer Timothy Williams testified that the name "Rod Fee' did not come up in the investigation until trial. (Tr. X, 1482.) He summarized the varying identifications of the witnesses at the lineup. (Tr. X, 1490-1501.) The prosecution then rested its case. (Tr. X, 1501.).

The defense first called Kent County Sheriff's Department employee Berendina Emery, who testified that according to jail records, Petitioner and Rod Fee were both housed at the Kent County Jail during a period from May 27, 1992 through July 2, 1992, (Tr. X, 1524.)

Petitioner's aunt, Linda Griffin, testified that she had seen Petitioner several times each week in the

fall of 1991 and had known him his whole life. She identified certain pictures taken of Petitioner at her son's birthday party on October 20, 1991. She stated that the photographs were an accurate reflection of the way Petitioner wore his hair at that time and that she had never seen Petitioner wear his hair in a pony tail or braid. (Tr. X, 1526-31.)

Monica Lee, Petitioner's girlfriend from 1989 to 1992, testified that she was very familiar with Petitioner's hair in 1991, because she had styled it, According to Lee, Petitioner wore his hair in a "finger wave," but never in a ponytail. Lee testified that it was not possible to wear hair in finger waves and in a pony tail simultaneously. (Tr. X, 1534-35.) In November 1991, Petitioner had a mustache and a small beard on the chin. (Tr. X, 1536, 37.) Lee testified that she lived with Petitioner and had never seen him in a Pistons, Duke or any other bluejacket. (Tr. X, 1535, 1540.) She testified that the only leather coat she had seen Petitioner wear was the waist-length leather jacket she gave him for Christmas in 1989 or 1990. (Tr. X, 1545.)

Petitioner testified on his own behalf. He testified that on November 6, 1991, he, Robert Glass, Rolando Lesley and Tony Jones drove from Battle Creek to So-So's, Petitioner drove a 1975 dark blue Buick four-door. (Tr. X, 1548-49. They arrived shortly after midnight and were searched at the door for weapons. (Tr. X, 1549.) He saw Dorothy Brown, whom he had met two weeks before at City Lights, and a man he knew by the name "Way Out"," whom he had met a week or two earlier on Prospect Street. (Tr. X, 1550-51.) Petitioner witnessed a fight break out near the rear bar. The fighters were "Way Out" and a man he did not know. Petitioner was on the dance floor when he saw "Way Out" hit the other man in the head with a glass. (Tr. X, 1552.) Petitioner tried to see what

was happening and was moving through people when he heard shots. (Tr. X 1554- 55.) He saw somebody fall in the area near the restroom. (Tr. X, 1555.) He and others tried to move toward the front exit. Many people were falling and running. Once he was outside the bar, he stopped a girl and asked if she knew who had done the shooting. When she said no, he and his friends got into the car and drove to the Holiday Inn, where they were staying. (Tr. X, 1556.) Petitioner testified that in November 1991, he wore his hair in finger waves, and he never wore a pony tail (Tr. X, 1557.) He also had a mustache and goatee, as shown in his aunt's pictures, although he had shaved the middle of the beard, (Tr. X, 1561-62.) By February 1992, when he was arrested, his hair was quite a bit longer. (Tr. X, 1558.) After coming to jail, he cut his hair because it had been damaged by a permanent wave done the week before his arrest. (Tr. X, 1558.) Petitioner testified that he never had a conversation about the crime with John Dent because he had never met the man. (Tr. X, 1560.) He testified that he never owned a Pistons or Duke jacket and was not a fan of those teams. (Tr. X, 1563.) Petitioner testified that he had called Dorothy Brown on the telephone sometime before the night of the shooting. In the days just after the shooting, Dorothy Brown called Petitioner's beeper and he returned her call. (Tr. X, 1557-58, 1667-68.) The defense then rested. (Tr. XI, 1592.)

At the conclusion of trial, on October 5, 1993, after four days of deliberations, the jury found Petitioner guilty of second-degree murder and felony firearm, and not guilty on the remaining two counts. (Tr. XII, 1733-36.) On November 29, 1993, Petitioner was sentenced to life imprisonment. (Sentencing Transcript, ("S. Tr."), 17, docket #25.)

B. Direct Appeal

On February 14, 1994, Petitioner appealed as of right to the Michigan Court of Appeals. His brief, which was filed by counsel on July 12, 1995, raised seventeen issues. Petitioner filed a pro per brief raising four supplemental issues. (See Def.-Appellant's Br. on Appeal, docket # 37.) Petitioner filed a motion to remand, which was initially denied by the court of appeals on October 10, 1995. (See 10/10/95 Mich. Ct. App Ord., docket #37.) On May 14, 1997, on its own motion, the court of appeals remanded the case for an evidentiary hearing on Petitioner's claim that he had been denied an impartial jury. (See 5/14/97 Mich. Ct. App. Ord., docket #37.) The Kent County Circuit Court, through successor judge Paul J. Sullivan, held a lengthy hearing, including expert testimony, about minority underrepresentation in the jury array. (4/27/98 Mot. Tr., docket # 22.) On June 8, 1998, Judge Sullivan issued findings of fact and an opinion. He found that blacks were consistently underrepresented in Kent County jury venires for all panels during the Jury term. He concluded, however, that such underrepresentation had not been shown to be systematic. (See 6/8/98 Cir. Ct. Op., docket # 38.) In an unpublished opinion issued after remand, the Michigan Court of Appeals reversed the circuit court, concluding that Petitioner had demonstrated that the jury venire systematically underrepresented black jurors and remanded the case for a new trial with proper jury selection procedures. (See 5/7/99 Mich. Ct. App. Opinion ("MCOA Op."), docket ## 37, 38.)

The prosecutor filed a motion for leave to appeal to the. Michigan Supreme By order entered October 6, 1999, the Michigan Supreme Court granted leave to appeal. (See Mich. Ord., docket #38.) On July 28, 2000, the Supreme Court reversed the court of appeals, holding that Petitioner had failed to demonstrate

either an unfair and unreasonable underrepresentation of African American jurors in the venire or that such underrepresentation was systematic. The court therefore remanded the case to the Michigan Court of Appeals for consideration of the remaining issues on appeal. *People v. Smith,* 463 Mich. 199, 615 N.W.2d 1(2000).

On remand from the supreme court, the court of appeals considered the remaining eighteen issues not considered in its first decision and affirmed the conviction and sentence. (See 2/27/01 MCOA Op., docket #37.) Petitioner sought rehearing, which was denied on April 9,2001. (See 4/9/01 MCOA Ord., docket # 37.) Petitioner filed a delayed application for leave to appeal to the Michigan Supreme Court, which was denied on February 4, 2002. Petitioner filed the instant petition on February 5, 2003.

Discussion

The AEDPA "prevents federal habeas 'retrials" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone,* 535 U.S. 685, 693-94 (2002). The AEDPA has "drastically changed" the nature of habeas review. *Bailey v. Mitchell,* 271 F.3d 652, 655 (6th Cit. 2001), cert. denied, 536 U.S. 911 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the "clearly established" holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor,* .529 U.S. 362, 412(2000); *Bailey*, 271 F.3d at 655. This Court also may not consider decisions of lower federal courts in determining whether the state decision is contrary to, or an unreasonable application of clearly established federal law. *Bailey*, 271 F.3d at 655; *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). Thus, the inquiry is "limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time [the petitioner's] conviction became final." *Onifer v. Tyszkiewicz*, 255 F.3d 313, 318 (6th Cir. 2001).

A decision of the state court may only be overturned if (1) it applies a rule that contradicts the governing law set forth by the Supreme Court, (2) it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result; (3) it identifies the correct governing legal rule from the Supreme Court precedent but unreasonably applies it to the fact of the case; or (4) it either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend a principle to a context where it should apply. *Bailey*, 271 F.3d at 655 (citing *Williams*, 529 U.S. at 413); *see also Bell,* 535 U.S. at 694; *Lancaster v. Adams,* 324 F.3d 423, 429 (6th Cir.), *cert. denied*, 124 S. Ct. 535 (2003).

A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."

Williams, 529 U.S. at4 11; accord *Bell*, 535 U.S. at 699. Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams*, 529 U.S. at 410.

Where the state court has not articulated its reasoning, the federal courts are obligated to conduct an independent review to determine if the state court's result is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented. *See Harris*, 212 F.3d at 943; *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003). Where the circumstances suggest that the state court actually considered the issue, the review is not de novo. *Onifer*, 255 F.3d at 316. The review remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA. *Harris*, 212 F.3d at 943. However, the Sixth Circuit recently has clarified that where the state court clearly did not address the merits of a claim, "there are simply no results, let alone reasoning, to which [the] court can defer in such circumstances, the court conducts do novo review. *McKenzie*, 326 F.3d at 727 (limiting *Harris* to those circumstances in which a result exists to which the federal court may defer); see also *Wiggins v. Smith*, 123 S. Ct. 2527, 2542 (2003) (reviewing habeas issue de novo where state courts had not reached the question); *Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003) (recognizing that *Wiggins* established de novo standard of review for any claim that was not addressed by the state courts).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir, 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the

presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Lancaster*, 324 F.3d at 429; *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989). Applying the foregoing standards under the AEDPA, I find that Petitioner is not entitled to relief.

I. Jury Underrepresentation

In his first ground for habeas relief, Petitioner argues that he was denied his rights under the Sixth and Fourteenth Amendments to a jury drawn from a "fair cross section" of the community. He asserts that there existed systematic underrepresentation of African-Americans on Kent County juries at the time of jury selection in his case, resulting in his being tried by an all-white jury. The record reflects that a total of 37 people were considered on voir dire before a jury of 14 was seated in the case. All of those 37 were white. During jury selection, seven jurors were dismissed for cause, four were dismissed on peremptory challenges by the prosecution, and twelve were dismissed on peremptory challenges by the defense. (Tr. I, 147-48.)

At an evidentiary hearing conducted on remand from the Michigan Court of Appeals, Petitioner presented a substantial body of evidence.[2] First, Kent

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[2]The evidentiary hearing was begun on February 2, 1998. Appellants sought additional time to produce additional testimony and evidence, and the hearing was continued to April 27, 1998. (4/27/98 Mot. Tr., 4.) In the materials produced by Respondent under Rule 5, RULES GOVERNING § 2254 CASES, the government has not provided a transcript of the first day of hearing. Because the Court concludes that the determinations made by the Michigan Supreme Court were not unreasonable, and because the expert testimony was accepted as fact by the Michigan courts, this Court will accept as accurate the version of

County Circuit Court Administrator Kim Foster testified about the selection of jury venires at the time Petitioner's jury was drawn. Foster testified that the original list of approximately 350,000 prospective jurors was drawn from the database of driver's licenses and identification cards maintained by the Michigan Secretary of State. (2/22/98 Mot. Tr., 14-16.) A key number was used to select every "nth" name from the list, in order to reduce the number of names to 50,000. (2/22/98 Mot. Tr., 17.) Notices were sent out by mail, and approximately 5% were returned as undeliverable. An additional fifteen to twenty percent generated no response. A second letter was mailed out to non-responders, which generally received about a 50% return rate. (2/22/98 Mot. Tr., 18-19.) An order to show cause then was mailed to the individuals who continued not to respond. (2/22/98 Mot. Tr., 19-20.) It was unknown how many served with show-cause orders failed to appear. (2/22/98 Mot. Tr., 48.) At the end of the process, the responding potential jurors were placed on the qualified jurors list. (2/22/98 Mot. Tr., 20.)

If a person responding to a questionnaire claimed a statutory exemption, the person was not placed on the potential juror list. The county did some checking of exemption claims, depending on resources, but for the most part relied on the person's word, (2/22/98 Mot. Tr., 21.) Neither the Secretary of State list nor the qualified jurors list contained the race of the person being kept or excused. (2/22/98 Mot. Tr., 22.)

A "second list" was selected randomly from the qualified jurors list. (2/22/98 Mot. Tr., 21.) If a notice to appear sent to a juror was not delivered, the court took

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the facts and transcript references for the February 2, 1998 hearing as provided by Petitioner.

no action. (2/22/98 Mot. Tr., 25.) If a person who received a notice failed to show up, a telephone call was attempted. If the person had no telephone, a letter "generally" was sent. If no response was received, no further action was taken. (2/22/98 Mot Tr., 26-27.)

Prior to October 1, 1993, district court jurors were selected first from the potential juror list. Only after district court lists were selected were circuit court jurors selected. (2/22/98 Mot. Tr., 27-31.) Petitioner's jury selection began September 13, 1993. The juror list for his jury panel would have been selected in May or June of 1992. (2/22/98 Mot. Tr., 28.) Foster then testified about the reason the October 1, 1993, change was made in the manner jurors were selected:

> Q Okay. Now, with respect to picking circuit jurors first rather than the procedure before, picking district jurors first, why was that change made?
>
> A The belief was that the respective districts essentially swallowed up most of the minority jurors, and Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just — it represented certain portions of the county.

(2/22/98 Mot. Tr., 30.) Foster also testified that during the time period in issue, the visible number of minority jurors appeared low.

Since 1993, the underrepresentation on circuit jury lists has improved. (2/22/98 Mot. Tr., 53.) After that time, people would seek to be excused for non-

statutory reasons, such as inability to get a ride or child care, but such requests were considered on a case-by-case basis. (2/22/98 Mot. Tr., 28-29.) Foster also testified that the court made no corrective efforts to compensate for certain potential problems:

> Q Just very quickly. We've submitted documents to the court, statistics indicated that black citizens are convicted of felonies proportionately more than white citizens, and I am wondering if; after excusing those who are under sentence for felony, you took any steps to correct any under- representation of minorities that the not under sentence but for felony rule might impose? Did you take any corrective efforts to say go out and find more minorities to compensate for those who had been excused for being under sentence for felonies?
>
> A During each month, no.
>
> Q No. And if it turned out, from one of our subsequent experts, that members of minority groups are less likely to have a car, more likely to be unmarried mothers who can't find babysitters, and if that had an effect on the number of minorities to the pool to take into account those excused because of the various excuses like no car, no ride, no babysitter?
>
> A I have no way of determining a race at the time those are being dealt

> with, as far as excuse for transportation, but to answer your question, is now once the month—those excuses are dealt with once an individual is summonsed to jury duty for a given month. Generally no further action is taken dealing with an excuse, We plan on, in requesting the numbers, or numbers of summonses for a month, that there will be some of those requests for excuse. So we always request enough people to be there.

(2/22/98 Mot. Tr., 40-41.)

Dr. Michael Stoline testified at the first hearing regarding the racial composition of various Kent County census tracks and the composition of jurors appearing from those districts for the time period of October 1, 1993 to September 30, 1994. He found statistically significant underrepresentation in twelve of the 35 tracts with a high black population. Of the tracts with low black population, thirteen of the 34 were overrepresented and only five were underrepresented. (2/22/98 Mot. Tr., 72-73.) He also found that the extent of the deviation was larger and more consistently pointed away from blacks than could be accounted for by chance, (2/22/98 Mot. Tr., 81-82.) At the second hearing, Stoline testified to the time period between April 1993 and October 1993. During that time period, the overall underrepresentation of black prospective jurors was 18 percent, but in the last monthly period, the period during which Petitioner's jury was selected, the underrepresentation was 34.8 percent. (4/27/98 Mot. Tr., 10-11.) In actual numbers of jurors, the underrepresentation would yield approximately four fewer potential black jurors. (4/27/98 Tr., 12-14.) Stoline testified that he did not

test for the statistical significance of the number. (4/27/98 Tr., 15-17.) He testified, however, that:

> [T]here seems to be an under-represent — the possibility of under-representation of blacks in the composition of the Kent County jury lists in both periods of time, and the essential cause, in my view, from the analyses reported in Table 1, is that there's a tendency for more jurors to be selected from those Kent County census tracts that contain more proportionate white adults' and fewer jurors selected from those Kent County census tracts that contain relatively fewer adult blacks
> . . . .

(4/27/98 Tr., 18.)

Kent County Public Defender Richard Hillary testified that in his experience as director of the Defender's Office, he had handled more than 130 trials. (2/22/98 Mot. Tr., 129.) He testified that in 1992 or 1993, the Kent County Bar Association[3] formed the Jury Minority Representation Committee, which, in approximately 1994, recommended changes that were adopted by the court. (2/22/98 Mot. Tr., 130, 133-35.) Those changes resulted in a noticeable increase in the numbers of minority jurors who appeared. (2/22/98 Mot. Tr., 135.) Hillary also testified that after consideration, the committee also concluded that the practice of removing district court jurors from the pool caused too few minority residents to appear on circuit court juries. (2/22/98 Mot. Tr., 13 5-36.)

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[3] The proper name of the organization is "The Grand Rapids Bar Association."

Kurt Metzger of Wayne State University testified as an expert in demographics and surveying techniques. (2/22/98 Mot. Tr., 147.) He testified that surveys routinely undercount African-Americans, renters, unmarried persons, people who move, and those in poorer housing. The problem is exacerbated when the government is involved. (2/22/98 Mot. Tr., 148-49.) He also testified that the same types of problems that keep people from jobs would keep them from jury service: transportation problems, single-parent households, and child-care problems (2/22/98 Mot. Tr., 154-55.) He testified that if people could use the excuse of having no ride or babysitter, the excuse would introduce an element of non-randomness into the selection process, and statistics show that such an element would have a disproportionate effect on the presence of black persons on juries. (2/22/98 Mot. Tr., 162-64.)

In a written opinion issued after the taking of testimony, the circuit court concluded that Petitioner had demonstrated that the representation of African-Americans in venires from which juries were selected was not fair and reasonable in relation to the number of such persons in the community. The court concluded, however, that Petitioner had failed to demonstrate that the underrepresentation was systematic. (6/8/98 Cir. Ct. Op., docket # 38.) The Michigan Court of Appeals reversed, finding systematic underrepresentation. (5/7/99 MCOA Op., docket # 38.) In a published opinion, the Michigan Supreme Court reversed the Michigan Court of Appeals. *Smith*, 463 Mich. 199, 615 N.W.2d 1. The supreme court expressed skepticism as to whether Petitioner had demonstrated underrepresentation of African Americans in the jury venire. *Smith*, 463 Mich. at 204-05, 615 N.W.2d at 3. Assuming the underrepresentation to exist, however, the court found that Petitioner had failed to demonstrate that such

underrepresentation was systematic. *Id.*, 463 Mich. at 205-06, 615 N.W.2d at 3-4.

The Sixth Amendment guarantees "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," This right to an impartial jury includes the right to a jury drawn from a "fair cross section of the community." *Taylor v. Louisiana,* 419 U.S. 522, 526, 530 (1975). As the Supreme Court has emphasized, however, there is "no requirement that petit juries actually chosen must minor the community." *Id.* at 538. "Defendants are not entitled to a jury of any particular composition,. . . but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* (citations omitted).

In order to establish a prima facie violation of the fair-cross-section requirement, a criminal defendant must show three things: (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the under-representation is due to a systematic exclusion of the group in the jury selection process. *Duren v. Missouri,* 439 U.S. 357, 364 (1979); *United States v. Forest,* 355 F.3d 942, 953-54 (6th Cir. 2004).

The Michigan Supreme Court carefully applied the *Duren* standard to the instant case:

> The question presented in this case is whether Kent County's former system of selecting jurors denied defendant his

Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). We hold that defendant was not denied this right because, although we grant him the benefit of the doubt on unfair and unreasonable underrepresentation, he has not shown systematic exclusion. Accordingly, we reverse the decision of the Court of Appeals and remand this ease to the Court of Appeals for consideration of defendant's remaining issues.

The United States Supreme Court has not specified the preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable. See Detre, note, *A proposal for measuring underrepresentation in the composition of the jury wheel*, 103 Yale LJ 1913, 1918-1920 (1994). Since *Duren*, the lower federal courts have applied three different methods of measuring fair and reasonable representation, known as the absolute disparity test, the comparative disparity test, and the standard deviation test. *Ramseur v. Beyer*, 983 F.2d 1215, 1231 (C.A.3, 1992). Each of these tests,

however, has been criticized. For example, in cases where the members of the distinctive group comprise a small percentage of those eligible for jury service, the absolute disparity test produces questionable results. S*ee United States v. Jackman,* 46 F.3d 1240, 1247 (C.A. 2, 1995). Likewise, most courts have rejected the comparative disparity analysis because when the distinctive group's population is small, a small change in the jury pool distorts the proportional representation. See *United States v. Royal,* 174 F.3d 1, 8 (C.A. 1, 1999). Finally, courts have applied a standard deviation analysis in Fourteenth Amendment cases, but not typically in Sixth Amendment cases. Detre, *supra* at 1922-1926. Some courts have used standard deviation analyses, see *Jackman, supra; Ramseur, supra*, but "no court in the country has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." *United States v. Rioux,* 97 F.3d 648, 655 (C.A. 2, 1996).

We thus consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual methods should be used exclusive of the others, Accordingly, we adopt a case-by-case approach. Provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable.

In this case, defendant presented some evidence of a disparity between the number of jury-eligible African-Americans and the actual number of African- American prospective jurors selected to the Kent County Circuit Court jury pool list. However, defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests. Nevertheless, rather than leaving the possibility of systematic exclusion unreviewed solely on the basis of defendant's failure to establish underrepresentation, we give the defendant the benefit of the doubt on underrepresentation and proceed to the third prong of the *Duren* analysis.

II

Assuming defendant has satisfied the first two prongs of the *Duren* analysis, defendant must still show that the underrepresentation of African-American jurors was systematic, "that is, inherent in the particular jury-selection process utilized." *Duren, supra* at 366, 99 S. Ct 664. We agree with our concurring colleague that defendant has not shown a systematic exclusion of African-Americans from the Kent County Circuit Court jury pool.

We further agree with our concurring colleague that defendant has not shown how the alleged siphoning of African-American jurors to district courts affected the circuit court jury pool. The

record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool. Defendant has simply failed to carry his burden of proof in this regard.

We also agree with our concurring colleague that the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans. The Sixth Amendment does not require Kent County to counteract these factors. *United States v. Purdy,* 946 F. Supp. 1094, 1104 (D. Conn., 1996).

Finally, even presuming that defendant can rely exclusively on statistics, he has not made the requisite showing in this case. In *Duren*, the Court noted that the defendant proved that a large discrepancy occurred in every weekly venire for approximately one year. *Duren, supra,* at 366, 99 S. Ct. 664. Here, while defendant's proof may satisfy any duration requirement, the disparities over that time fell far short of those in *Duren*. Defendant did not demonstrate unfair and unreasonable underrepresentation under the disparity analyses. We therefore conclude that defendant has not shown a systematic exclusion of African-Americans for the Kent County Circuit Court jury pool.

People v. Smith, 463 Mich. 199, 204, 615 N.W.2d 1, 2-4 (Mich. 2000) (footnotes omitted).

As the Michigan Supreme Court noted, the United States Supreme Court has not conclusively decided the standard by which underrepresentation should be measured. The Michigan Supreme Court's consideration of all three of the tests applied by lower federal courts therefore does not constitute an unreasonable application of *Duren*. The court correctly noted that the disparities at issue in the instant case were far more modest than those at issue in *Duren*.

Moreover, the state court's determination that Petitioner had failed to show that any underrepresentation was systematic also was not unreasonable. Although the scientific witnesses testified that the statistical occurrence of fewer African-Americans was not random, the witnesses failed to provide testimony that any disparity was caused by the "systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364. As the Michigan Supreme Court noted, the Supreme Court never has held that the Constitution requires the state to counteract the influence of social and economic factors that may affect juror participation. *See United States v. Craft,* No. 97 5898, 1998 WL 702348, at *3 (6th Cir, Sept. 24, 1998) (systematic exclusion requires "evidence that a racially unbalanced jury pool. . . resulted from the very methods employed to select the jurors used to decide federal cases in the district); *Polk v. Hunt,* No. 95-5323, 1996 WL 47110, at *2 (6th Cir. Feb. 5, 1996) (holding that exclusion is not systematic "if it is gathered without active discrimination") (citing *United States v. Cecil,* 836 F.2d 1431, 1445 (4th Cir. 1988)); *United States v. Purdy*, 946 F. Supp. 1094, 1104 (D. Conn. 1996). Although Petitioner presented testimony that the selection of district court juries before circuit court juries possibly affected the racial makeup of the pool of circuit court jurors, he did not present more conclusive evidence and did not provide evidence of any disparity in the proportion of district

court jurors drawn in the Grand Rapids district court as opposed to the other district courts in the circuit. (See 6/8/98 Cir. Ct. Op., docket # 38.) Indeed, Petitioner himself presented evidence that a number of social and economic factors were likely to have influenced the responses and participation of potential jurors. In sum, Petitioner himself presented more than one explanation of statistical disparities, only one of which was evidence of arguably systematic exclusion of the group attributable to the jury selection process. As a consequence, the Michigan Supreme Court's determination did not constitute an unreasonable application of established United States Supreme Court precedent.

II. **Exclusion of Evidence of Police Threat**

Petitioner argues that his right of confrontation and his right to present a defense were unconstitutionally hampered by the trial court's limitations on defense questioning. Specifically, Petitioner contends that he was not permitted to cross-examine Katherine Brown about her conflicting identifications of Petitioner: from being unable to identify Petitioner at the lineup, to remembering at the preliminary examination that she saw Petitioner fight with the decedent, to testify at trial that she saw Petitioner with a gun. Specifically, Petitioner wanted to ask Katherine Brown about a threat made by Detective Lyzenga against her sister, Dorothy Brown:

> Q All right, And were you aware that Detective Lyzenga had told Dorothy that during her interview that she was going to be in some kind of trouble, did you become aware of that?

> MR. VANDERMOLEN: Your Honor, I'm going to object to whatever statement, if there was any, was made — wasn't made to this witness and seems out of her ability to know, and that would be hearsay anyway.
>
> MR. PLASZCZAK: I believe she may answer if she knows, your Honor.
>
> THE COURT: It sounds like hearsay to me, unless there's some exception to it. I mean, the conversation between Lyzenga and her sister Dorothy. So I'd sustain the objection.

(Tr. II, 249.)

Respondent asserts that the claim is procedurally defaulted because Petitioner failed to preserve the issue by making a sufficient offer of proof. When a state-law default prevents further state consideration of a federal issue, the federal courts ordinarily are precluded from considering that issue on habeas corpus review. *See Ylst v. Nunnemaker,* 501 U.S. 797, 801 (1991); *Engle v. Isaac,* 456 U.S. 107 (1982). The Sixth Circuit applies a four-part test to determine whether a claim is procedurally defaulted: (1) the court must first determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule; (2) the court must decide whether the state courts actually enforced the state procedural rule; (3) the default must be an "independent and adequate" state ground on which the state can rely to foreclose review of a federal constitutional claim; and (4) if the foregoing are met, the petitioner must demonstrate cause for his failure to follow the rule and that he was actually prejudiced by the alleged constitutional error.

Buell v. Mitchell, 274 F 337, 348 (6th Cir. 2001) (citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lancaster*, 324 F.3d at 436-37(6th Cir. 2003); *Greer v. Mitchell*, 264 F.3d 663, 672(6th Cir. 2001), *cert. denied*, 535 U.S. 940 (2002); *Patterson v. Haskins*, 316 F.3d 596,604 (6th Cir. 2003). To determine whether Petitioner has been denied relief based on a procedural default, we look to the last "reasoned judgment rejecting the [federal] claim." *Ylst*, 501 U.S. at 803. The doctrine is applicable if "the last state court to review [the prisoner's] conviction 'clearly and expressly' relied on [prisoner's] procedural default in its decision affirming Petitioner's conviction." *Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994). There may be an "exceptional case in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 382 (2002). A petitioner may also excuse a default by making a colorable claim of innocence; that is, he has shown that any constitutional error "probably" resulted in the conviction of one who was actually innocent. *Schiup v. Delo*, 513 U.S. 298, 322 (1995) (citing *Murray v. Carrier*, 477 U.S. 478, 495 (1986)). This exception is reserved for a very narrow class of cases, based on a claim of "new reliable evidence." *Schlup*, 513 U.S. at 315, 324.

Here, the court of appeals concluded that Petitioner had waived the objection because he failed to make an offer of proof to provide the reviewing court with the information it needed to evaluate the claim of error. (MCOA Op., at 2-3.) As a consequence, the court reviewed the claim only for plain error affecting substantial rights. *Id.*

A state law procedural rule is adequate and independent when it was "firmly established and regularly followed" at the time of the asserted

procedural default. *Rogers v. Howes,* 144 F.3d 990, 992 (6th Cir. 1998) (citing *Ford v. Georgia,* 498 U.S. 411, 423-24(1991)). Although the Michigan courts have required offers of proof in certain circumstances, ordinarily such offers of proof are required when a court has sustained an objection and a party seeks to demonstrate a basis for admissibility that may not be apparent from the record. *See Orlich v. Buxton,* 22 Mich. App. 96, 100, 177 N.W.2d 184 (1970). It is not entirely clear whether the rule was sufficiently "regularly followed" in circumstances similar to this ease. It therefore is questionable whether the rule as applied may be considered an adequate and independent state ground. As a result, the question of procedural default presents a complicated question of Michigan law. Where the procedural default issue raises more questions than the case on the merits, the Court may assume without deciding that there was no procedural default or that Petitioner could show cause and prejudice for that default. *See Lambrix v. Singletary,* 520 U.S. 518, 525 (1997); *Cone v. Bell,* 243 F.3d 961, 971 (6th Cir. 2001), *rev 'don other grounds,* 535 U.S. 685 (2002); *Binder v. Stegall,* 198 F.3d 177, 178(6th Cir. 1999). The Court therefore will proceed directly to the merits of Petitioner's claim.

Petitioner's constitutional claim rests on the inherent right to present a defense protected by the Confrontation Clause the Sixth Amendment and thc Due Process Clause of the Fourteenth Amendment. The Supreme Court ha determined that a criminal defendant has the right to a "meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). The right is derived from the Sixth Amendment rights to compel and confront witnesses and from the Due Process Clause of the Fourteenth Amendment. *See Chambers v. Mississippi,* 410 U.S. 284,302(1973); *Washington v. Texas,* 388 U.S. 14, 19 (1967) ("Just as an accused has

the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense, This right is a fundamental element of due process law."). The Supreme Court, however, repeatedly has recognized that the right to present a defense is subject to reasonable restrictions. See *United States v. Scheffer,* 523 U.S. 303, 308 (1998); *Taylor v. Illinois,* 484 U.S. 400, 410 (1988) (the Sixth Amendment does not confer on the accused an "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under rules of evidence'); *Rock v. Arkansas,* 483 U.S. 44, 55 (1987); *Chambers*, 410 U.S. at 295; *see also Wong v. Money,* 142 F.3d 313, 325 (6th Cir. 1998). The right to present relevant evidence during cross-examination "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295; *accord Rock*, 483 U.S. at 55 ('The right to present relevant testimony is not without limitation.").

As set forth in the description of facts and as noted in the Michigan Court of Appeals decision, the limitations imposed on the questioning of Katherine Brown were grounded in the basic evidentiary rules governing hearsay testimony. Petitioner had ample opportunity and exercised that opportunity to extensively cross-examine Katherine Brown about the contradictions in her identifications. (See Tr. II, 234-265.) This opportunity for examination alone ensured Petitioner's right of confrontation. *See Trombetta*, 467 U.S. at 485. In addition, Petitioner cross-examined Detective Lyzenga, who acknowledged that he had told Katherine Brown that her sister could be charged as an accessory for not cooperating. (Tr. X, 1465-68.) From both sources, counsel had more than ample testimony from which to argue Katherine Brown's lack of credibility and possible reasons for changing her

testimony. As noted, the facts underlying Katherine Brown's potential motive for fabricating her testimony were exploited through the remaining questioning of Katherine Brown and the testimony of Detective Lyzenga. The singular limitation on cross-examination complained of here therefore did not deprive Petitioner of his right to present a defense in violation of the Confrontation Clause. The state court's determination was neither contrary to nor an unreasonable application of established Supreme Court precedent.

III. Improper Exclusion of Evidence — Robert Glass Admission

Petitioner next argues that witness John Dent should have been permitted to testify that "Yankee" (Robert Glass) admitted to Dent that he committed the shooting at So-So's on the evening in question. Sustaining an objection, the court instructed the jury to disregard -Dent's testimony that Glass admitted to the shooting. (Tr. VIII. 1214.) Petitioner asserts that the exclusion of evidence of Glass' confession violated his right to due process in accordance with *Chambers v Mississippi,* 410 U.S. 284 (1973).

As previously discussed, the Constitution confers upon criminal defendants the right to present a complete defense, subject to reasonable restrictions on the admission of testimony. See *Scheffer*, 523 U.S. at 308; *Taylor*, 484 U.S. at 410; *Rock*, 483 U.S. at55; *Chambers*, 410 U.S. at 295. A petitioner "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302. In applying its evidentiary rules, a state must weigh the interests sewed by the rule against the limitation imposed upon the defendant's constitutional right to present a defense. See *Rock*, 483 U.S. at 56.

In *Chambers*, the Supreme Court invalidated a state's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." 410 U.S. at 302. Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The state trial judge barred the evidence because the state hearsay rule did not contain an exception for declarations against penal (as opposed to pecuniary) interest. *Id.* at 299. Moreover, the state's "voucher" rule, which prohibited parties from impeaching their own witnesses, barred Chambers from calling the declarant to the stand and introducing his out-of-court statement against him. *Id.* at 295-96. The Supreme Court held that local rules of evidence cannot be applied "mechanistically" when such rules would threaten the "fairness and reliability [of] . . . the ascertainment of guilt and innocence" and thereby "defeat the ends of justice." *Id.* at 302. In assessing the reliability of the hearsay testimony, the Court in Chambers found that some exculpatory statements contained a "persuasive assurance of trustworthiness," because (1) the confession was spontaneously made to two close acquaintances shortly after the murder occurred; (2) each statement was corroborated at trial by other independent evidence; (3) the confession was self-incriminating and unquestionably against penal interest; and (4) the declarant was available for cross-examination. *Id.* at 300-301.

Since that time, in *Washington v. Texas,* 388 U.S. 14 (1967), the Supreme Court rejected another categorical exclusion, that is, Texas' blanket exclusion of the testimony of other persons charged as principals, accomplices or accessories in the same crime. 388 U.S. at 15. The Supreme Court held:

> The right to offer the testimony of witnesses, and to compel their

> attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19. *See also Crane v. Kentucky,* 476 U.S. 683 (1986) (holding that the exclusion of testimony regarding the circumstances of the petitioner's confession for purposes of assessing the reliability and credibility of the confession deprived him of his right to present a defense); *Rock,* 483 U.S. at 61 (striking down Arkansas' per se rule excluding all hypnotically refreshed testimony because it placed an arbitrary restriction on a criminal defendant's constitutional right to testify on her own behalf.)

Although *Chambers* and its progeny unquestionably remain "the law," recent decisions of the Supreme Court have made clear that *Chambers* may be invoked only in extreme cases. For example, in *Montana v. Egelhoff,* 518 U.S. 37, 52 (1996), a plurality of the Court sought to limit *Chambers* to its facts, stating:

> Thus, the holding in *Chambers* — if one can be discerned from such a fact-intensive case — is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that

> erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.

Egelhoff, 518 U.S. at 52. Similarly, discussing *Crane*, the *Egelhoff* Court stated that it's decision "[did] nothing to undermine the principle that the introduction of relevant evidence can be limited by the State for a 'valid' reason," *Egelhoff*, 518 U.S. at 53.

Most recently, a majority of the Supreme Court held that a per se rule against admission of polygraph evidence in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense. See *Scheffer*, 523 U.S. 303 (1998). The Court held that state rules excluding evidence from criminal trials "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 308 (quoting *Rocky v. Arkansas,* 483 U.S. 44, 55 (1987)). The Court added that the exclusion of evidence is unconstitutionally arbitrary or disproportionate "only where it has infringed upon a weighty interest of the accused." *Id.* As the *en banc* Sixth Circuit recently observed, "the Supreme Court has made it perfectly clear that the right to present a 'complete' defense is not an unlimited right to ride roughshod over reasonable evidentiary restrictions." *Rockwell v. Yukins*, 341 F.3d 507, 512 (2003) (en banc), *cert. denied* 124 S. Ct. 1601 (2004).

Furthermore, *Chambers* was decided before the enactment of the AEDPA, and, thus, the Court did not apply the highly deferential ABDPA standard. Under the AEDPA, a federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision

applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411; *accord Bell*, 535 U.S. at 699. Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams*, 529 U.S. at 410. As the Sixth Circuit recently stated in reviewing a state court's determination to exclude hearsay evidence, "[w]hether this court would or would not have come to the same conclusion reached by the Michigan Court of Appeals as to the trustworthiness of the preferred statements is completely irrelevant." *Allen v. Hawley*, No. 01-1320, 2003 WL 21911327, at *6 (6th Cir. Aug. 7, 2003). The question is whether the Michigan Court of Appeals unreasonably applied *Chambers* and its progeny. *Id.*

The cited Supreme Court cases involved the wholesale exclusion of an entire category of evidence or witnesses. Unlike *Chambers*, MICH. R. EVID. 804(b)(2) does not require the wholesale exclusion of all statements against penal interest. Rather, the Rule provides a hearsay exception for statements against penal interest where corroborating circumstances indicate trustworthiness. There is no question that statements inculpating the declarant and exculpating the defendant are inherently suspect. *See Chambers*, 410 U.S. at 299-300, *United States v. Noel*, 938 F.2d 685, 688-89 (6th Cir. 1991). Accordingly, the requirements of MICH. R. EVID. 804(b)(2) are not "arbitrary" or "without justification".

In reviewing the trial court's decision for plain error,[4] the Michigan Court of Appeals held as follows:

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[4] Michigan Court of Appeals found that Petitioner had failed to preserve the issue below and thus reviewed only for plain error affecting substantial rights. (See 2/27/01 MCOA Op. at 3.) I note, however, that the issue was the subject of a record argument and decision covering seven pages of trial transcript.

> At trial, Dent testified that both defendant and Glass told him that Glass had been the shooter. The trial court properly excluded Dent's testimony concerning Glass' admission of guilt because Glass' statement did not bear the persuasive indicia of trustworthiness. *Chambers v. Mississippi,* 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *People v. Conte,* 152 Mich App 8, 13; 391 NW2d 763 (1986). Glass' confession lacked indicia of trustworthiness because (1) the admission established that the shooting occurred outside of So-So's, which contradicts all other evidence introduced at trial that established that the shooting occurred within So-So's, including defendant's own testimony, and (2) defendant denied knowing Dent or making any statement to Dent. Moreover, Glass testified at trial and was subject to cross-examination by defendant.

(2/27/01 MCOA Op. at 3.)

The conclusion by the court of appeals that the statement lacked the indicia of trustworthiness was not unreasonable under *Chambers.* As noted above, in *Chambers,* the Supreme Court found the hearsay statement sufficiently reliable because (1) the confession was spontaneously made to two close acquaintances shortly after the murder occurred; (2) each statement was corroborated at trial by other independent evidence; (3) the confession was self-incriminating and unquestionably against penal interest; and (4) the declarant was available for cross-

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(Tr. VIII, 1206-1212.) The issue clearly was preserved for appeal and therefore was not procedurally defaulted.

examination. *Id.* at 300-01. In this case, as noted by the Michigan Court of Appeals, Glass' alleged admission was completely at odds with all of the trial evidence, including Petitioner's own testimony. According to Dent, Glass claimed he lured the victim outside So-So's and then shot him. All other evidence indicated that the shooting occurred in the bar. In addition, Glass' alleged confession was made in Petitioner's company and purportedly paralleled Petitioner's own statement to Dent, undermining a finding of spontaneity. Both of these factors weigh heavily against the admission of Glass' statement.

The court of appeals considered these factors, among others, in concluding that Glass' statement lacked sufficient indicia of trustworthiness to be admitted at trial. In the circumstances of this case, trial court's ruling under M.R.E. 804(b)(3) was neither arbitrary nor disproportionate to the purpose of the rule, i.e., to prevent the admission of unreliable hearsay evidence. Accordingly,I cannot find that the trial court's decision to exclude Glass' hearsay statement was an unreasonable application of clearly established federal law as determined by the United States Supreme Court. See *Allen v. Hawley*, No. 01-1320, 2003 WL 21911327, at *6 (6th Cir. Aug. 7, 2003) (state trial court did not unreasonably apply Supreme Court precedent, so as to warrant habeas relief, when it concluded that the trustworthiness required for admission of a hearsay statement against penal interest was absent). The fact that this or another court would have made a different judgment call is without consequence for purposes of review under the AEDPA. *See Rockwell*, 341 F.3d at 512; *Allen*, 2003 WL 21911327 at *6.

IV. Prosecutorial Misconduct — Questioning of Witnesses

In his fourth ground for habeas relief, Petitioner argues that the prosecutor engaged in misconduct when he improperly acted as a witness by challenging witnesses on the basis of what they allegedly told the prosecutor outside the courtroom. The Michigan Court of Appeals addressed the issue as follows:

> Defendant asserts that the prosecutor engaged in misconduct when he improperly acted as a witness by challenging witnesses on the basis of what they allegedly had told the prosecutor. . . . We conclude that defendant has failed to demonstrate error requiring reversal. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Foster,* 175 Mich App 311, 317; 437N.W.2d 395 (1989). A prosecutor engages in misconduct when the prosecutor injects personal knowledge into the proceedings through testimonial questioning. *People v. Christensen,* 64 Mich App 23,28-29; 235 N.W.2d 50 (1975).
>
> * **
>
> With respect to defendant's unpreserved claim that the prosecutor engaged in improper testimonial questioning during the examination of Latonia Thrash, we conclude that defendant has not shown a plain error that affected substantial rights, i.e., that the outcome of the proceeding would have

> been different. *Carines, supra* at 763,774; *People v. Schutte*, 240 Mich App 713, 720; 613 N.W.2d 370(2000) (this Court reviews unpreserved claims of prosecutorial misconduct for plain error). Our review of the record indicates that the prosecutor's questions did not constitute improper testimonial questioning because the question did not impart personal knowledge of the prosecutor to the jury. The challenged question was merely a reference to the testimony that preceded it.

(2/27/01 MCOA Op. at 4.) As the Michigan Court of Appeals noted, the Petitioner failed to preserve the error by objecting at trial. The Michigan Court of Appeals expressly relied on Michigan's contemporaneous objection rule in denying Petitioner's claim. It is clear that the contemporaneous objection rule was well-established at the time of Petitioner's trial. See, e.g., *People v. Kelly*, 423 Mich. 261, 271, 378 N.W.2d 365 (1985). A rule designed to arm trial judges with the information needed to rule reliably "serves a governmental interest of undoubted legitimacy." *Lee*, 534 U.S. at 385. Petitioner's failure to comply with the state's independent and adequate state procedural rule, i.e., making a contemporaneous objection, caused him to default his claims in state court. See *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977); *Lancaster*, 324 F.3d at 437; *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996). Accordingly, review by this Court is barred unless Petitioner can show cause and prejudice, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray*, 477 U.S. at 485. Further, even when the state court reviews the issue under a manifest injustice standard or to prevent a miscarriage of

justice, Petitioner's failure to object is still considered a procedural default. See *Paprocki v. Foltz,* 869 F.2d 281, 284-85 (6th Cir. 1989); see also *Coe v. Bell,* 161 F.3d 320, 330 (6th Cir. 1998)) (citing *Harris v. Reed,* 489 U.S. 255, 264 n.10 (1989)).

Petitioner has not attempted to demonstrate cause for the procedural default. Moreover, even were Petitioner's procedural default excused, his claim would be rejected. Misconduct by a prosecutor can rise to the level of a constitutional violation. *Lundy v. Campbell,* 888 F.2d 467, 474 (6th Cir. 1989). For habeas relief to be granted, the prosecutorial misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). When a petitioner makes a claim of prosecutorial misconduct, "the touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219 (1982). The Supreme Court has emphasized a series of factors to be evaluated in determining whether prosecutorial misconduct so infected the trial as to amount to a violation of due process: (1) whether the comments were isolated or pervasive, (2) whether they were deliberately or accidentally placed before the jury, (3) the degree to which the remarks had a tendency to mislead and prejudice the defendant, (4) whether the prosecutor manipulated or misstated the evidence, (5) the strength of the overall proof establishing guilt, (6) whether the remarks were objected to by counsel and (7) whether a curative instruction was given by the court. See *Darden,* 477 U.S. at 182-83; *United States v. Young,* 470 U.S. 1, 12-13 (1985); *Donnelly,* 416 U.S. at 646-47; *Berger v. United States,* 295 U.S. 78, 84-85 (1935).

In *Berger v. United States*, 295 U.S. 78 (1935), the Supreme Court addressed a circumstance in which a prosecutor made assertions calculated to the jury. *Id.* at 85. Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, improper insinuations or suggestions are apt to carry more weight against a defendant than such statements by witnesses. The Supreme Court held that insinuations or suggestions by the prosecutor outside the evidence are improper:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id at 88-89. The principles set forth in *Berger* forbid the government's injection of improper or prejudicial material that deprives an accused of his or her right to a fair trial. For instance, the government prosecutor may not express to the jury his or her personal knowledge of the guilt of the accused, *United States v. Bess*, 593 F.2d 749, 754 (6th Cir. 1979), or bring to the

jury's attention purported facts that are not in evidence and are prejudicial, *United States v. Leon,* 534 F.2d 667, 679 (6th Cir. 1976) (citing *Berger*, 295 U.S. at 88, 55 S.Ct. at 633). *See also United States v. Solivan,* 937 F.2d 1146, 1150-51 (6th Cir. 1991).

The Michigan Court of Appeals expressly found that the prosecutor's comment did not constitute improper testimony, but instead referred to earlier statements made by the witness during the course of her testimony. That finding is presumed to be correct unless rebutted by Petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Having reviewed the record transcript (Tr. VIII, 1185), I find that the determination of the court of appeals not only was reasonable, but also undoubtedly was correct. All of the record evidence indicates that the prosecutor was referring the witness to her earlier responses during the course of an examination in which the witness made a series of unclear and apparently contradictory statements. Accordingly, the state court determination was patently reasonable.

V. Improper Use of Grand Jury Testimony

Petitioner asserts that his right to confrontation under the Sixth Amendment was violated by the prosecutor's use of grand jury testimony, which had never been subject to cross-examination, to "jumpstart" Robert Glass' lack of memory at the time of trial. Again, the state court declined to address the question on the merits because Petitioner failed to object at the time the evidence was introduced, and because he also had the opportunity to cross-examine Glass at trial about his grand jury testimony. (2/27/01 MCOA Op. at 5.)

As I previously observed, the contemporaneous objection rule was well-established at the time of

Petitioner's trial. *See, e.g., Kelly*, 423 Mich. at 271. Petitioner's failure to comply with the state's independent and adequate state procedural rule, i.e., making a contemporaneous objection, caused him to default his claims in state court. *See Wainwright*, 433 U.S. at 87-88; *Lancaster*, 324 F.3d at 437; *West*, 73 F.3d at 84. As a result, the Court will review the claim only if Petitioner can show cause and prejudice, or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Murray*, U.S. at 485.

Petitioner makes no attempt to demonstrate cause for his procedural default. Ineffective assistance of counsel can serve as cause to excuse a procedural default. *See Edwards v. Carpenter,* 529 U.S. 446, 453 (2000). However, to serve as cause to excuse a procedural default, a claim of ineffective assistance of counsel must be properly exhausted. *Edwards*, 529 U.S. at 453. While Petitioner raises a claim of ineffective assistance of trial counsel in his petition, he never argues that counsel was ineffective for failure to object to the use of Glass' grand jury testimony. He also did not raise the argument in the state courts. Ineffective assistance of trial counsel therefore cannot excuse the default. Petitioner makes no other argument that would demonstrate cause. Where a petitioner fails to show cause, the court need not consider whether he has established prejudice. *See Engle v. Isaac*, 456 U.s. 107, 134 n.43 (1982); *Leroy v. Marshall*, 757 F.2d 94, 100 (6th Cir. 1985). Nor has petitioner suggested any fundamental miscarriage of justice and none is apparent. As the Michigan Court of Appeals observed, notwithstanding Glass' testimony that he did not see petitioner with a gun that night, "other witnesses testified that they observed petitioner with a gun either immediately before, during, or after the shooting." (2/27/01 MCOA Op. at 5.) "Any error," as the Court of Appeals held, "did not effect [the outcome of the proceeding. . ." *Id.*

VI. Improper Exclusion of Evidence — Testimony About Witness Position

In his sixth ground for habeas relief, Petitioner argues that the trial court improperly and unconstitutionally excluded defense questioning of Leonora Jones as to whether her brother, Anthony Hardin, was in a position to view the shooting. Petitioner asserts that the limitation improperly limited his right to cross-examination and impaired his right of confrontation under the Sixth Amendment.

As previously discussed, the primary interest secured by the Confrontation Clause of the Sixth Amendment is the right of cross-examination. *Davis v Alaska,* 415 U.S. 308, 315(1974) (citing *Douglas v. Alabama,* 380 U.S. 415, 418 (1965)). The Confrontation Clause generally guarantees only "an opportunity for effective cross-examination," *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985). It does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 20. In *Chambers*, 410 U.S. at 30, the Court made clear that in the exercise of this right, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," The right to present relevant evidence during cross-examination "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295; *accord Rock v. Arkansas,* 483 U.S. 44, 55 (1987) ("The right to present relevant testimony is not without limitation.").

Although Petitioner raised the constitutional issue in his state-court proceedings, the Michigan Court of Appeals addressed the matter solely as one of state law. As I previously have observed, the Sixth

Circuit has clarified that where the state court clearly did not address the merits of a claim, the federal court on habeas review must conduct de novo review. *McKenzie*, 326 F.3d at 727; *see also Wiggins*, 123 5. Ct. at 254); *Maples*, 340 F.3d at 437 (6th Cir. 2003). In reviewing the claim under state law, however, the Michigan Court of Appeals made certain factual findings that are subject to deference by this Court unless rebutted by clear and convincing evidence. *See Herbert*, 160 F.3d at 1134. The court of appeals made the following determination about the ability of Jones to respond to the kind of questioning sought by Petitioner:

> A review of the record shows that Jones had no knowledge of where her brother was located at the time she saw defendant re-enter the bar and fire additional shots. Accordingly, any testimony on her part regarding whether her brother was in a position to see defendant re-enter the bar and fire additional shots would be purely speculative Moreover, there is no indication in the record that defendant was precluded from asking that Jones' brother be recalled so that defendant could question him about whether he saw defendant re-enter the bar.

(2/27/01 MCOA Op. at 7.)

This Court must defer to the finding of the Michigan Court of Appeals. Petitioner had ample opportunity and did extensively cross-examine both Leonora Jones and Anthony Hardin regarding the circumstances of the shooting. He also cross-examined Leonora Jones about her position and that of her brother. This examination alone ensured petitioner's

right of confrontation. Moreover, on the basis of Jones' testimony, Petitioner has failed to demonstrate by clear and convincing evidence that the state court erred in determining that Jones' testimony about her brother's ability to see would be speculative.

VI Confrontation Clause — Police Officer Testimony

In his seventh ground for habeas relief, Petitioner asserts that the trial court on several occasions permitted police officers to testify to a variety of hearsay information. Petitioner contends that the improper hearsay admissions violated his constitutional right under the Confrontation Clause of the United States Constitution.

As noted at several earlier points in this report, the Sixth Amendment guarantees to the criminal defendant the right "to be confronted with the witnesses against him." The Supreme Court has held that

> the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.

California v. Green, 399 U.S. 149, 157-58 (1970). Thus, where the declarant testifies and is cross- examined, "our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem" *Green*, 399 U.S. at 162; *see also United States v. Owens*, 484 U.S. at 560 (inquiry into the "indicia of reliability" or the "particularized guarantees of trustworthiness" of the out-of-court statements is not called for when the declarant is available at trial and subjected to

unrestricted cross-examination, because "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements").

In the instant ground for relief, Petitioner raises a number of specific instances in which hearsay testimony was admitted at trial, only some of which were the subject of objections at trial. In addressing the claims, the Michigan Court of Appeals held as follows:

> Defendant next claims that the trial court improperly admitted numerous instances of hearsay testimony from police officers regarding what others had told them or what they "ascertained" from what others had told them. While Defendant preserved many of his hearsay challenges by objecting below, some of the hearsay challenges and defendant's constitutional challenge were not raised below. We will review defendant's preserved, nonconstitutional hearsay challenges under the "more probable than not" standard, i.e., defendant must show that it is more probable than not that a different outcome would have resulted without the error. *Lukity, supra;* see, also, *Carines, supra* at 774. Defendant's unpreserved challenges, both constitutional and nonconstitutional, will be reviewed under the plain error that affected substantial rights standard, i.e. that the error affected the outcome of the proceeding. *Carines, supra* at 763-764, 774.

> Hearsay is defined as a statement, other than one made by the declarant while testifying at trial or hearing, offered in. evidence to prove the truth of the matter asserted. MRE 801(a).
>
> After reviewing the record and defendant's many instances of alleged hearsay challenges, we conclude that many of the statements admitted by the trial court were properly admitted because the statements did not constitute hearsay or were properly admitted as third-party identification testimony under MRE 801(d)(1)(C) and *People. v. Malone*, 445 Mich 369, 377-78, 384-85; 389-90; 518 NW2d 418 (1994). Further, one of the complained-of challenges was sustained by the trial court after defendant's hearsay objection. Accordingly, if error did occur in this instance, it was cured by the trial judge's action. Even assuming that the trial court did improperly admit several of the hearsay statements, our review of the record establishes that the outcome of the proceedings was not affected by the errors. Defendant has failed to establish evidentiary error warranting reversal.

(2/27/01 MCOA Op. at 7-8, docket # 37.)

The Michigan Court of Appeals determined that Petitioner's constitutional challenge under the Confrontation Clause was not properly raised in his objections at trial. As a result, the court reviewed the constitutional challenge only for plain error affecting substantial rights. As I previously noted, the Michigan court's reliance upon Petitioner's failure to properly

object at trial renders the constitutional claim procedurally defaulted. See *Wainwright,* 433 U.S. at 87-88; *Lancaster*, 324 F.3d at 437; *West*, 73 F.3d at 84. As a result, the Court ordinarily will review the claim only if Petitioner can show cause and prejudice. *Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 485.

Petitioner makes no attempt to demonstrate cause for his procedural default. While Petitioner raises a claim of ineffective assistance of trial counsel in his petition, he never argues that counsel was ineffective for failing to object to the hearsay admissions on the grounds of constitutional violation, *Edwards*, 529 U.S. at 453 (ineffective assistance of counsel may constitute cause to excuse procedural default). Petitioner therefore fails to demonstrate cause excusing his procedural default.

Moreover, even were Petitioner's claim not procedurally defaulted, his claim would be without merit. First, Petitioner points to Detective Lyzenga's testimony that he had ascertained from interviews and records that the "Baby D" mentioned by Dorothy and Kathy Brown and Tonya Griver, was Petitioner. All three witnesses, however, subsequently independently identified Petitioner themselves. The fact that Lyzenga discovered information first leading him to suspect that Petitioner was "Baby D" did not constitute significant additional evidence. Because the evidence could not have had a "substantial and injurious effect or influence in determining the jury's verdict," it was, at most, harmless error. *See Nevers v. Killinger*, 169 F.3d 352, 371 (6th Cir. 1999) (holding that *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993), harmless error standard continues to apply on habeas review even after the amendments to the AEDPA). Petitioner cannot establish that the error resulted in actual prejudice. *McGhee v. Yukins,* 229 F.3d 506, 513 (6th Cir. 2000).

In addition, the fact that Lyzenga was permitted to testify as to his efforts to find a person by the name of 'Way Out" does not involve the introduction of impermissible hearsay. Although Lyzenga testified in a limited fashion about the results of what he had been told, the evidence was admissible to prove the efforts he had made to eliminate "Way Out" from the investigation. Further, the fact that Lyzenga and Williams never heard the name "Rod Fee" during the investigation does not amount to impermissible hearsay. Whether or not a name was mentioned does not go to the truth of the matter asserted, but only to whether it was said. The fact that a person was not mentioned is simply not within the ambit of the Confrontation Clause. In addition, Lyzenga's mention of the identifications made by Katherine Brown and Naeem Wahid were not impermissible hearsay. They were admissible to demonstrate that the identifications at trial were not recent fabrications. Further, because the witnesses testified subject to cress examination, no Confrontation Clause issue has been proven. *See Green*, 399 U.S. at 162.

Similarly, Officer Kooistra's testimony that Ernest Watson identified petitioner while being driven home from the lineup was admissible as non-hearsay because it was relevant to proving that Watson had not manufactured his identification after the date of the lineup. In addition, Watson himself testified as to his statements to Kooistra, during which he was subject to cross-examination. Therefore, because. Watson himself testified to the out-of-court statement to Kooistra, no constitutional right was implicated by Kooistra's testimony. *Id.* In any event, any. admission of the testimony was harmless because it was cumulative. *Nevers*, 169 F at 371.

The testimony of Officer Williams regarding the out-of-court statements made to him by Fee, Dent and Bowman also were admissible for the purpose of demonstrating that all three had made statements the investigation that were consistent with their trial testimony. Further, all three witnesses were subject to cross-examination. As a result, the Confrontation Clause was not implicated. *See Green,* 399 U.S. at 162. Moreover, because each witness testified consistent with the out-of-court statements, the admission of the consistent hearsay statements was necessarily harmless. *Nevers*, 169 F.3d at 371.

In sum, Petitioner has failed to demonstrate either a violation of the Confrontation Clause or that any admission was not harmless. As a result, the conclusion by the Michigan Court of Appeals that Petitioner had failed to demonstrate plain error that affected the outcome of the proceedings was not contrary to or an unreasonable application of Supreme Court precedent. 28 U.S.C. § 2254(d).

VIII. Prosecutorial Misconduct — Improper Argument

Petitioner contends that the prosecutor made constitutionally improper arguments to the jury during closing arguments. He asserts that the prosecutor created an atmosphere of fear in his closing argument by suggesting that all the witnesses were afraid of Petitioner and that those witnesses who identified Petitioner or gave other incriminating evidence were courageous. He refers to a limited number of statements, to which objections were made, over the course of ten pages of transcript:

> MR. VANDERMOLEN: . . . But I submit to you that it doesn't appear that he (Ernest Watson) saw much, if he saw

anything. It indicates that he, like other witnesses are afraid to identify the defendant when faced with to you, for reasons that are obvious, also, because they know he kills people for very little reason. And—

MR. PLASZCZAK: I would object, your Honor, I don't believe that is in evidence.

THE COURT: Again, I believe that's a factual objection, and it's up to the jury to make the factual determinations from the evidence. You may continue.

MR. VANDERMOLEN: But in addition to those six people that see the defendant and have the courage to stand up here and positively identify him in court, as being the person responsible for these crimes, and I submit to you that it is an act of courage on their part. . . Because if you had just seen someone murder somebody in cold blood, there's no guarantee that he just doesn't walk out of here at the end of this trial. How do you

MR. PLASZCZAK: If it may please the Court, I believe that that's an improper and prejudicial argument on the part of the prosecutor.

THE COURT: Well, of course, the jury will be reminded in a few moments, after our break, of reasonable doubt, of burden of proof, of the fact that penalty doesn't affect their decision at all, and all the standard instructions; that all, although

standard, are very important, and in a few moments they will hear those, and I think we ought to just wind this up and move along here.

***

MR. VANDERMOLEN: I just feel compelled to point out, I submit, the extraordinary courage on the part of the people that have pointed out and positively identified the defendant as the shooter here, because I submit to you, many people have not that could have, and this is a caliber —

MR. PLASZCZAK: Again I'm going to object, your Honor, he's referring that people could have. There's nothing in evidence to support that at all.

THE COURT: Both sides have referred off and on to witnesses who are not here, and kind of read things into that, and I instruct the jury that all you are to consider is the witnesses you've actually heard from. That's the old standard instruction. The evidence comes in in the open courtroom. We're not going to speculate or guess as to what other witnesses may or may not have said, or if there were any other witnesses.

Okay, you may continue.

***

MR. VANDERMOLEN: . . . But that's the caliber of people we're talking about here.

> Caliber of people that have the courage to stand up and say what they saw, despite the obvious risks.

(Tr. XI, 1677-1686.)

The Michigan Supreme Court rejected Petitioner's claim of prosecutorial misconduct as follows:

> Defendant claims that the prosecutor attempted to shift the burden of proof when he argued facts not in evidence by asserting that various witnesses were afraid to testify against defendant and when the prosecutor advanced a civic duty argument. We conclude that defendant was not deprived of a fair and impartial trial by prosecutorial misconduct. *Foster, supra* at 317.
>
> While a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v. Stanaway*, 446 Mich 643, 686; 521 N.W.2d 557 (1994), the prosecutor may argue the evidence and all reasonable inference arising from it to the jury, People v. Bahoda, 448 Mich 261, 282; 531 N.W.2d 659 (1995). Our review of the record indicates that the prosecutor's argument was supported by the evidence and reasonable inferences drawn therefrom. The testimony of Brown and Bowman provided factual support for the prosecutor's argument that witnesses were afraid to identify defendant as the shooter. Moreover, from the fact that

> Watson identified defendant outside of defendant's presence, but refused to do so in defendant's presence, the prosecutor could reasonably infer that Watson was afraid to identify defendant, .
>
> We also reject defendant's claim that he was denied a fair trial because the prosecutor appealed to fear and the jury's sense of civic duty. Assuming arguendo that the prosecutor's argument was improper because it appealed to the jury's sense of civic duty, i.e., the need to reward the witnesses for their courage and the need to protect the witnesses from defendant by convicting defendant, we conclude that any error was harmless because the prosecutor's argument was not of such an inflammatory nature so as to have resulted in the jury rendering a verdict based on fear rather than the evidence.

(2/27/01 MCOA Op. at 8.)

As I previously noted, for habeas relief to be granted, the prosecutorial misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden* U.S. at 181 (quoting *Donnelly*, 416 U.S. at 643); *see also Wilson v. Mitchell*, 250 F.3d 388, 399 (6th Cir. 2001) (citing *Kincade v. Sparkman*, 175 F.3d 444, 445-46 (6th Cir. 1999)). In such a case, "the touchstone of due process analysis. is the fairness of the trial, not the culpability of the prosecutor." *Smith*, 455 U.S. at 219. The Supreme Court has identified various factors to be evaluated in determining whether prosecutorial misconduct so infected the trial as to amount to a violation of due process: (1) whether the comments

were isolated or pervasive, (2) whether they were deliberately or accidentally placed before the jury, (3) the degree to which the remarks had a tendency to mislead and prejudice the defendant, (4) whether the prosecutor manipulated or misstated the evidence, (5) the strength of the overall proof establishing guilt, (6) whether the remarks were objected to by counsel and (7) whether a curative instruction was given by the court. *See Darden*, 477 U.S. at 182-83; *Young*, 470 U.S. at 12-13; *Donnelly*, 416 U.S. at 646-47; *Berger*, 295 U.S. at 84-85.

The Michigan Court of Appeals properly considered the nature of the prosecutor's remarks and the extent of the potential impact. First, the comments identified by Petitioner were not continuous, but occurred over the space of ten pages of transcript. In addition, the first comment, as to which the court overruled the objection, was supported by testimony of two witnesses who specifically reported being scared. Dorothy Brown testified that she was afraid when Petitioner called her the day after the shooting. (Tr. II, 299.) In addition, Garlinda Bowman testified that she identified no one at the lineup "[b]ecause I thought they could see me, I was scared." She testified that while she was being driven home she told the detective that she had recognized Petitioner as one of the people who beat-up the victim. (Tr. III, 457.) The Michigan Court of Appeals concluded that the argument was proper argument from the evidence and reasonable inferences. While this Court might have reached a different conclusion, were it deciding the question in the first instance, the conclusion reached by the Michigan courts is not unreasonable.

The remaining comments, while not specifically overruled, were followed by reminders from the court regarding the limitation on the jury to consider only the evidence introduced and to avoid speculation of

other potential evidence that did not come into evidence. Balancing the factors identified by the Supreme Court, I conclude that the Michigan Court of Appeals' determination that the prosecutor's remarks did not deny Petitioner a fair trial was not objectively unreasonable.

IX. Unconstitutionally Suggestive Lineup

Petitioner next argues that the pretrial identification lineup was unduly suggestive. Gayle Brennan of the Kent County Defender Officer, who was present at the lineup, testified at a June 14, 1993 evidentiary hearing that she became concerned about differences in hairstyle, body size and facial hair between Petitioner and the other men in the lineup. According to the testimony introduced at the motion hearing, Brennan knew of another prisoner in the jail who had features and hair that was similar to Petitioner's, and she requested the prisoner be added to the lineup. Her suggestion that the prisoner be added to the lineup was rejected by the deputy. Brennan testified that she also was concerned about comments made by assistant prosecutor Steven Dunker that suggested that the shooter was among those in the lineup (Mot. Tr. 6/14/93, 39-44.)

The trial court concluded in a written opinion that the photographs of the lineup demonstrated "that the people chosen for the line-up were sufficiently similar to provide a meaningful line-up and to not provide any type of suggestive identification of the Defendant himself." (7/13/03 Cir. Ct. Op. at 3; dkt # 3.) The court also found that the description of the question asked by the prosecutor at the lineup was "simply a way of defining or describing the person that the witnesses were asked to identify were present. It is the Court's Opinion that this was not suggestive and did not taint the line-up at issue." (Id. at 3.) The

Michigan Court of Appeals carefully reviewed Petitioner's objections to the fairness of the lineup procedures and reached the following determinations:

> Defendant contends that the trial court erred in refusing to suppress the identification evidence because the lineup was unduly suggestive. We disagree. This Court reviews a trial court's ruling on a motion to suppress evidence on legal grounds for clear error. *People v McElhaney*, 215 Mich App 269, 273; 545 N.W.2d 18 (1996). The suggestiveness of a corporeal lineup is to be examined in light of the totality of the circumstances. *People v. Kurylczyk*, 443 Mich 289, 311-12 (Griffin, J.), 318 (Boyle, J.); 505 N.W.2d 528 (1993). Generally, physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness. *Id.* at 312 (Griffin, J.), 318 (Boyle, J,). Physical differences among lineup participants are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other participants in the lineup. *Id.* It is then that there exists a substantial likelihood that the differences among lineup participants, rather than recognition of the defendant, were the basis of the witness' identification. *Id.*
>
> We reject defendant's claim that the lineup was impermissibly suggestive because of the physical differences between defendant and the other four participants. The photograph of the

lineup participants shows that the participants were roughly the same height, with only a few inches difference between the tallest and the shortest. A few of the participants had a darker complexion than defendant, and one appears to have had the same complexion as defendant. The other four participants had closely-cropped hair while defendant was the only participant who was bald and who had facial hair (*i.e.*, a mustache). Finally, defendant had a physique similar to that of one other participant, while the other three were slimmer. Our Supreme Court has stated that a lineup is not impermissibly suggestive where the defendant was the second tallest participant and heavier than the other participants, where age and height differences existed between defendant and the other participants, where defendant was the only participant with a scarred face, and where the defendant was the only participant with a mustache and goatee. *Id.* Based on the photograph and the fact that only three of the twelve witnesses identified defendant, we conclude that the physical, differences that existed between defendant and the other four participants were of insufficient magnitude to substantially distinguish defendant from the other participants.

We also reject defendant's claim that the assistant prosecutor present at the lineup made a comment that suggested that the shooter was in the lineup. The testimony on which defendant

> relies established that the assistant prosecutor neither imparted to the witnesses that the police had arrested the actual shooter nor that person number 4 in the lineup (*i.e.,* defendant) was the actual shooter. Instead, the testimony established only that the assistant prosecutor posed a general question meant to ascertain whether any of the witnesses recognized anyone in the lineup. Given the totality of the circumstances as set forth above, we conclude that the trial court did not clearly en in determining that the corporeal lineup was not impermissibly suggestive.

(2/27/01 MCOA Op. at 2.)

When reviewing a petitioner's claim that an out-of-court identification violated his or her due process rights, the court's primary concern is with the reliability of the evidence. *See Manson v. Brathwaite,* 432 U.S. 98, 114 (1977); *Wilson v. Mitchell,* 250 F.3d 388, 397 (6th Cir. 2001). This Court applies a two-part inquiry. "First, the court evaluates the undue suggestiveness of the pre-identification encounters." *Thigpen v. Cory,* 804 F.2d 893, 895 (6th Cir. 1986) Second, if the identification procedures are found to be unduly suggestive, the Court turns to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. *Wilson,* 250 F.3d at 397. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty

demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Wilson*, 250 F.3d at 397.

The Michigan Court of Appeals, like the trial court, based its conclusion on the first prong of the inquiry, that is, whether the pre-identification encounters were unduly suggestive. *Wilson*, 250 F.3d at 397. Both courts concluded that the persons participating in the lineup were sufficiently similar to prevent suggestive identification. The court of appeals noted that the participants were roughly the same height. Three participants were slimmer, while one other was similar in build. Three had a darker complexion, but one had a similar complexion. While Petitioner was the only bald participant, all four of the other participants had closely cropped hair.[5] The court concluded that the physical differences were of insufficient magnitude to distinguish Petitioner. The court also concluded that the question allegedly asked by the prosecutor was not unduly suggestive, but instead merely described the person the witnesses were asked to identify.

As previously observed, the Court accords a presumption of correctness to findings of state appellate courts, as well as the trial court. *See* 28 U.S.C. § 2254(e)(1); *Sumner*, 449 U.S. at 546; *Smith*, 888 F.2d at 407 n.4. Petitioner has failed to demonstrate clear and convincing evidence of error in the courts' factual conclusions. 28 U.S.C. § 2254(e)(1). Further, this Court may grant habeas corpus relief only if the state-court determinations about the

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[5]I also note that, at the time of the shootings, Petitioner purportedly had long hair, combed back into a ponytail or a wave. The fact that Petitioner's shaved head was substantially different from the hair described by most witnesses further undermines a conclusion that the lineup was unduly suggestive.

suggestiveness of the lineup and the question of the prosecutor were objectively unreasonable. *Williams*, 529 U.S. at 410-11; 28 U.S.C. § 2254(d)(1). Petitioner has failed to demonstrate that the court of appeals' determinations were objectively unreasonable. Petitioner's ninth ground for habeas relief therefore should be denied.

X. Improper Reference to Jail

Petitioner asserts that the prosecutor improperly solicited testimony from Rod Fee that Fee had met Petitioner in jail. Because Petitioner failed to object at trial, the Michigan Court of Appeals reviewed the question only for plain error affecting Petitioner's substantial rights. As I previously have noted, Michigan's contemporaneous objection rule was well at the time of Petitioner's trial. *See, Kelly*, 423 Mich. at 271. The rule is designed to arm trial judges with the information needed to rule reliably, and clearly serves a legitimate governmental interest. *Lee*, 534 U.S. at 385. Petitioner's failure to comply with the state's independent and adequate state procedural rule, i.e., making a contemporaneous objection, caused him to default his claims in state court. *See Wainwright*, 433 U.S. at 87-88; *Lancaster*, 324 F.3d at 437; *West*, 73 F.3d at 84. Accordingly, review by this court is barred unless Petitioner can show cause and prejudice, or a miscarriage of justice. *Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 485, Petitioner has failed to articulate either cause or prejudice for his default. Nor was there any fundamental harm to petitioner from testimony he had been in a jail, since he testified himself regarding his incarceration. (See 2/27/01 MCOA Op. at 5.) This claim therefore is barred.

X Ineffective Assistance of Counsel at Trial

Petitioner argues that trial counsel was ineffective in three particular ways: (1) defense counsel 'failed to hire an investigator as requested by Petitioner; (2) counsel failed to make appropriate motions, including a motion to suppress the identifications under *People v. Kachar,* 400 Mich. 78, 252 N.W.2d 807 (1977); and (3) counsel failed to ask Detective Lyzenga whether he threatened to arrest Dorothy Brown. Petitioner asserts that he requested remand for an evidentiary hearing on the issue of the effectiveness of counsel, but was denied. He now asserts that he is entitled to an evidentiary hearing in this court and a determination that he received the ineffective assistance of trial counsel.[6]

In *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984), the Supreme Court established a two-prong

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[6]Generally, habeas corpus actions are determined on the basis of the record made in the state court. See Rule 8, RULES GOVERNING § 2254 CASES IN THE DISTRICT COURT. An e[illegible]ntiary hearing in the district court is not mandatory unless one of the circumstances listed in 28 U.S.C. § 2254(e)(2) is present. *See Sanders v. Freeman,* 221 F.3d 846, 852 (6th Cir. 2000). Section 2254(e)(2) permits an evidentiary hearing only if:

> (A) the claim relies on —
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(A)-(B). In the instant case, the factual predicate for the claim is apparent on the record and no further evidentiary development is required.

test by which to evaluate claims of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 687. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id* (citing *Michel v. Louisiana,* 350 U.S. 91, 101 (1955)); see also *Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691. Both prongs of the *Strickland* test involve mixed questions of law and fact. *Id.* at 698. Where counsel's performance did not fall below an objective standard of reasonableness, the court need not reach the question of prejudice. See *United States v. Foreman*, No. 01-3892, slip op. at 8-9 (6th Cir. March 25, 2003).

None of defense counsel's purported errors constitutes the ineffective assistance of counsel. Petitioner's argument that counsel was ineffective in investigating whether lineup witnesses were shown photos of Petitioner before the lineup is merely speculative. The trial transcript contained no

testimony and Petitioner has provided no information suggesting that photographs were shown to anyone, other than to Alan Thompson. Thompson did not testify at trial and only assisted officers during their investigation to identify Petitioner as "Baby D.". (Mot. Tr. 6/14/93, 15-16.) Further, the fact that most witnesses failed to identify Petitioner at the lineup strongly suggests that no such demonstrations occurred and therefore counsel could not have been ineffective for failing to hire an investigator. Moreover, assuming such photographs were shown, because most witnesses failed to identify Petitioner at the lineup, Petitioner cannot demonstrate prejudice.

Prior to trial, defense properly moved to suppress the witness identifications on the grounds that the lineup was unduly suggestive. The motion to suppress was denied by the court after an evidentiary hearing. Petitioner now argues that counsel should have specifically argued that the identifications were not admissible under the eight-factor test of *People v. Kachar,* 400 Mich. 78, 252 N.W.2d 807 (1977). In *Kachar*, the court considered the appropriateness of a photographic show-up. The court. applied the federal standard for unconstitutionally suggestive identification procedures set forth in *Stovall v. Denno,* 388 U.S. 293, 302 (1967), and *Simmons v. United States,* 390 U.S. 377, 384 (1968). See *Kachar,* 400 Mich. at 90. The *Kachar* court found that the photographic lineup was unduly suggestive. *Id.* at 91. It then went on to consider whether an independent basis existed for admission of the in-court identification that was not tainted by the suggestive lineup, applying the nonexclusive factors identified by the Supreme Court *in United States v. Wade,* 388 U.S. 218, 241 (1967). See *Kachar,* 400 Mich. at 93-94 (applying *Wade* and identifying eight factors affecting the independence of an identification following an improper lineup).

The standard applied in *Kachar* for the determining whether a lineup is suggestive does not differ from the constitutional challenge separately raised by Petitioner. As the Michigan Court of Appeals concluded, and as I previously have discussed with respect to Petitioner's ninth ground for relief, the record does not show that the identification procedures used were unconstitutionally suggestive. Where, as here, the lineup was not unduly suggestive, no basis existed for reaching the separate eight-factor determination under *Kachar* for whether the in-court identifications were sufficiently independent to be admissible. Petitioner therefore has failed to demonstrate that the state court's determination was unreasonable, and counsel cannot be found to be ineffective.

Petitioner also argues that trial counsel was ineffective when he failed to ask Detective Lyzenga whether he had threatened to arrest Dorothy Brown. Petitioner argues that such questioning was critical because Dorothy Brown identified Petitioner only after she had been threatened.

The Michigan Court of Appeals rejected the argument, concluding that Petitioner failed to support his contention:

> [T]he record reveals that, on cross-examination, defense counsel elicited testimony from Lyzenga that Brown did not initially implicate defendant, that Lyzenga then accused Brown of lying, and that Lyzenga told Brown that her lying would land her in trouble.

(2/27/01 MCOA Op. at 10.) The state court's finding is entirely reasonable. A review of the record shows that counsel asked Lyzenga what kind of trouble he had indicated Dorothy would be in unless she assisted in

identifying Petitioner. Lyzenga indicated that he was talking about being an accessory after the fact to murder. (Tr. X, 1464.) Lyzenga testified, however, that he could not recall whether he actually conveyed the nature of his threat either to Katherine Brown or Dorothy Brown. (Tr. X, 1467.) Counsel was well justified in not asking further questions after receiving such responses. To ask more directly whether a specific threat had been made would run the risk of receiving a denial from Lyzenga, which would have been damaging to Petitioner's theory. With the kind of responses he already had elicited, counsel was free to and did argue to the jury that Lyzenga had made threats. (Tr. XI, 1653.) Petitioner has entirely failed to demonstrate any "acts or omissions [that] were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

In sum, Petitioner has failed to show that counsel was ineffective in any of the ways identified in his brief. The state court's finding that counsel was not ineffective was not an unreasonable application of clearly established Supreme Court precedent.

XII. Ineffective Assistance of Counsel at Sentencing

In his twelfth ground for habeas relief, Petitioner argues that he received the ineffective assistance of counsel at sentencing. Petitioner first asserts that counsel did nothing to assist him at sentencing, except to point out one small error in the presentence report and to reiterate that Petitioner maintained his innocence. Petitioner also asserts that he did not have the opportunity to review the presentence report. He avers in an attached affidavit that the presentence report contains a claim that Petitioner was running a crack distributorship in Kentucky. Petitioner asserts that he would have

challenged the claim had he been aware of its presence in the report.

The Michigan Court of Appeals concluded as follows:

> The decision to address the sentencing court and what information to be given the court are tactical decisions. *People v. Newton (After Remand),* 179 Mich App 484, 493-94; 446 NW2d 487 (1989). Defendant does not explain what mitigating information defense counsel should have presented during allocution. Accordingly, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. *People v. Pickens,* 446 Mich 298, 302-02; 521 NW2d 797 (1994).
>
> Defendant also asserts that he did not have an opportunity to review the presentence report (PSIR). Defendant failed to raise this claim below. Moreover, the record contains a statement by defense counsel that both he and defendant had reviewed the PSIR. The record does not support defendant's claim.

(2/27/01 MCOA Op. at 9.)

The decision of Michigan Court of Appeals is patently reasonable. As I previously have noted, in order to show ineffectiveness of counsel, Petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally

unfair. outcome. *Strickland*, 466 U.S. at 687. The Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel*, 350 U.S. at 101).

As the Michigan Court of Appeals held, petitioner has identified no mitigating information that counsel should have been expected to produce. He therefore fails to meet his burden of overcoming the presumption that counsel was acting within the range of professional assistance. *Strickland*, 466 U.S. at 687.

With respect to Petitioner's claim that he did not see the presentence report before sentencing, as the court of appeals observed, defense counsel represented at the sentencing hearing that Petitioner had reviewed the presentence report. (Sent. Tr., 36) Petitioner did not contradict the argument, notwithstanding the fact that he made lengthy remarks to the sentencing court, during which he criticized other decisions made by his counsel. (Sent. Tr., 40-43.) The court of appeals' conclusion that Petitioner's claim was not supported by the record is entirely reasonable. Petitioner therefore has failed to overcome the presumption that the state court's factual finding was correct or to demonstrate that the state-court decision constituted an unreasonable application of established Supreme Court precedent.

Recommended Disposition

For the foregoing reasons, I respectfully recommend that the habeas corpus petition be denied.

Dated: November 4, 2005 /s/ Hugh W. Brenneman, Jr.
Hugh W. Brenneman, Jr.
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. C P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

Michigan Supreme Court
Lansing, Michigan 48909

Opinion

Chief Justice
Elizabeth J. Weaver

Justices
Michael F. Cavanaugh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman

FILED JULY 28, 2000

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 114785

DIAPOLIS SMITH,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

CORRIGAN, J.

The question presented in this case is whether Kent County's former system of selecting jurors denied defendant his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). We hold that

defendant was not denied this right because, although we grant him the benefit of the doubt on unfair and unreasonable underrepresentation, he has not shown systematic exclusion. Accordingly, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's remaining issues.

I

We join parts I through II(A) and part II(C)(2) of the concurring opinion, but part company with our concurring colleague on the analysis of the second prong of *Duren*.

The United States Supreme Court has not specified the preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable. See Detre, note, *A proposal for measuring underrepresentation in the composition of the jury wheel*, 103 Yale L J 1913, 1918- 1920 (1994). Since *Duren*, the lower federal courts have applied three different methods of measuring fair and reasonable representation, known as the absolute disparity test, the comparative disparity test, and the standard deviation test. *Ramseur v Beyer*, 983 F2d 1215, 1231 (CA 3, 1992). Each of these tests, however, has been criticized. For example, in cases where the members of the distinctive group comprise a small percentage of those eligible for jury service, the absolute disparity test produces questionable results. See *United States v Jackman*, 46 F3d 1240, 1247 (CA 2, 1995). Likewise, most courts have rejected the comparative disparity analysis because when the distinctive group's population is small, a small change in the jury pool distorts the proportional representation. See *United States v Royal*, 174 F3d 1, 8 (CA 1, 1999). Finally, courts have applied a standard deviation analysis in Fourteenth Amendment cases,

but not typically in Sixth Amendment cases. Detre, supra at 1922- 1926. Some courts have used standard deviation analyses, see *Jackman, supra; Ramseur, supra,* but "no court in the country has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." *United States v Rioux,* 97 F3d 648, 655 (CA 2, 1996)

We thus consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual method should be used exclusive of the others. Accordingly, we adopt a case-by-case approach. Provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable.

In this case, defendant presented some evidence of a disparity between the number of jury-eligible African Americans and the actual number of African American prospective jurors selected to the Kent County Circuit Court jury pool list. However, defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests.[1] Nevertheless, rather than leaving the possibility of systematic exclusion

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[1] We note that neither defendant nor the prosecution presented expert testimony regarding application of the standard deviation test. We do not endorse our concurring colleague's efforts to craft his own standard deviation analysis from the available data. Nor do we approve the concurring opinion's endorsement of *People v Hubbard (After Remand),* 217 Mich App 459; 552 NW2d 493 (1996). The constitutional conclusion *Hubbard* reached has not been adequately briefed, and we need not reach that question to resolve this case.

unreviewed solely on the basis of defendant's failure to establish underrepresentation, we give the defendant the benefit of the doubt on underrepresentation and proceed to the third prong of the Duren analysis.

II

Assuming defendant has satisfied the first two prongs of the *Duren* analysis, defendant must still show that the underrepresentation of African American jurors was systematic, "that is, inherent in the particular jury-selection process utilized." *Duren, supra* at 366. We agree with our concurring colleague that defendant has not shown a systematic exclusion of African Americans from the Kent County Circuit Court jury pool.

We further agree with our concurring colleague that defendant has not shown how the alleged siphoning of African American jurors to district courts affected the circuit court jury pool. The record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool. Defendant has simply failed to carry his burden of proof in this regard.

We also agree with our concurring colleague that the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African Americans. The Sixth Amendment does not require Kent County to counteract these factors. *United States v Purdy*, 946 F Supp 1094, 1104 (D Conn, 1996).[2]

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[2] Although the constitution does not concern itself with problems not inherent in a jury selection process that nevertheless may adversely affect jury participation, this Court, through the State Court

Finally, even presuming that defendant can rely exclusively on statistics he has not made the requisite showing in this case. In *Duren*, the Court noted that the defendant proved that a large discrepancy occurred in every weekly venire for approximately one year.[3] *Duren, supra* at 366. Here, while defendant's proof may satisfy any duration requirement, the disparities over that time fell far short of those in Duren. Defendant did not demonstrate unfair and unreasonable underrepresentation under the disparity analyses. We therefore conclude that defendant has

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Administrative Office, has been studying ways to increase jury participation. We have undertaken several initiatives in recent years to address concerns about juries and jury service. For example, in 1998, the State Court Administrative Office began reviewing the American Bar Association Standards Relating to Juror Use and Management with an eye to producing Michigan standards. Similarly, this Court retained the National Center for State Courts Center for Jury Management to address the jury selection and management procedures in trial courts where jury concerns had been raised, and to make recommendations for improvement in those courts. Finally, this Court has worked with the State Bar of Michigan Open Justice Commission to improve citizen participation in jury service, focusing on improving the representativeness of juries.

[3] In *Duren*, the Court specifically concluded that the petitioner had demonstrated that the underrepresentation was due to the operation of the exemption criteria. *Duren, supra* at 367. Therefore, *Duren* did not hold that the third prong was established solely on the basis of statistical proof; there was also proof of the cause of the underrepresentation.

not shown a systematic exclusion of African Americans for the Kent County Circuit Court jury pool.

III

We conclude that defendant has not established a prima facie violation of the Sixth Amendment fair cross-section requirement. We therefore reverse the decision of the Court of Appeals, and remand this case to the Court of Appeals for consideration of defendant's remaining issues.

s/*Maura D. Corrigan*
s/*Elizabeth A. Weaver*
s/*Clifford W. Taylor*
s/*Robert P. Young, Jr.*
s/*Stephen J. Markman*

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 114785

DIAPOLIS SMITH,

Defendant-Appellee.

CAV.ANAGH, J. (concurring).

In this case, I must decide whether Kent County's former system of selecting jurors denied defendant his Sixth .Amendment right to an impartial jury drawn from a fair cross section of the community. To establish that this right was denied, a criminal defendant must show that a distinctive group was underrepresented in his jury venire, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). I would hold that defendant was not denied this right because, although I would grant him the benefit of the doubt on unfair and unreasonable underrepresentation, he has not shown systematic exclusion. Accordingly, I would reverse the decision of the Court of Appeals and remand this case for consideration of defendant's previously unreviewed issues.

I

Defendant's conviction arises out of a Grand Rapids bar fight that occurred in November 1991. One patron was shot to death in the fight, and a bullet also struck the bar's bouncer when he tried to intervene in the fracas. On the basis of these events, defendant was charged with murder, assault, and possession of a firearm during the commission of a felony, and was tried in September and October 1993.

At the conclusion of the jury voir dire, defendant objected to the lack of any black jurors, alleging bias in the jury selection process. The number of prospective jurors that were in the pool is not clear; the trial court estimated that sixty prospective jurors were requested for venire, and defendant estimates that one hundred were requested. Both estimate that three of these prospective jurors were black, and agree that none of the thirty—seven examined were black. Defendant requested more peremptory challenges to cure this, but the trial court denied his request, finding no bias in the selection. The jury seated found defendant guilty of second degree murder and felony-firearm, and the trial court sentenced him to life in prison.

Defendant appealed, requesting a remand for a new trial on the ground that he was denied his right to an impartial jury drawn from a fair cross section of the community. The Court of Appeals denied that request, but, after argument, it sua sponte remanded defendant's case for an evidentiary hearing on defendant's allegations of impropriety in the selection of the jury venire.[1] Evidentiary hearings were held in February and April 1998.

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[1]On remand, defendant's case was consolidated with *People v Robert Palmer*, (Court of Appeals Docket

The hearings supplied details about the Kent County jury selection process. At the time defendant's jury was chosen, the database for jurors was a list of names that the Kent County Court Administrator requested from the Michigan Secretary of State. This list included no information other than names, and was taken from records listing holders of Michigan driver's licenses and holders of Michigan identification cards. The number of names requested was based on the number of jurors the administrator anticipated that all Kent County courts would need for the relevant period.[2]

The next step in jury selection was sending all persons on this list a qualifying questionnaire. About five percent of these questionnaires were returned as undeliverable,[3] and another fifteen to twenty percent were not answered. Those persons who did not answer received a letter from the Chief Judge of the Kent Circuit Court, detailing the penalties for not answering, and encouraging an answer. About half of

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No. 174649), which raised a similar issue. *Palmer* is otherwise unrelated to the instant case.

[2]Some time after defendant was tried, Kent County changed this practice, and began requesting all names on the list, rather than a given number.

[3] At the time defendant was tried, no action was taken on undeliverable questionnaires. Kent County changed this practice as well, and currently, when questionnaires are returned as undeliverable, additional questionnaires are sent into the same area where prior attempts resulted in the undeliverable questionnaires.

those who initially did not answer the questionnaire did so upon receiving this letter.[4]

After all answers were received, certain prospective jurors were exempted from service. Some prospective jurors claimed statutory exemptions,[5] and

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[4] The Kent Circuit Court Administrator testified that for persons who did not respond to this letter, the standard process was to request that they appear in court to show cause why they had not responded. Those who further failed to appear generally became the subject of bench warrants, although law enforcement agencies refuse to serve the warrants because the warrants lack personal information necessary for their service.

[5] MCL 600.1307a; MSA 27A.1307(1) provides in pertinent part:

> (1) To qualify as a juror a person shall:
>
> (a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the person is selected, and in the case of a district court in districts of the second and third class, be a resident of the district, and in the case of municipal courts of record, be a resident of the municipality.
>
> (b) Be conversant with the English language.
>
> (c) Be physically and mentally able to carry out the functions of a juror. Temporary inability shall not be considered a disqualification.
>
> (d) Not have served as a petit or grand juror in a court of record during the preceding 12 months.

others requested nonstatutory exemptions for individualized reasons, such as lack of transportation or child care, or because of work— related matters. The race of those prospective jurors exempted was not known.

Prospective jurors were then summonsed for the Kent County courts. Once summonsed, jurors were first selected for the 61 District Court in the city of Grand Rapids, as well as for the other Kent County district courts.[6] The Kent Circuit Court Administrator attempted to contact any potential jurors that were summonsed but did not appear.[7] After district court jurors were selected, all remaining jurors were available for circuit court.

(e) Not be under sentence for a felony at the time of jury selection.

(2) A person more than 70 years of age may claim exemption from jury service and shall be exempt upon making the request.

[6] Beginning in October 1993, after defendant's trial, jurors were selected first for the Kent Circuit Court. The administrator testified that this change was made because "[t]he belief was that the respective districts essentially swallowed up most of the minority jurors . . . ."

[7] Those prospective jurors who failed or refused to appear may have been ordered to show cause, and if such a person further failed to appear at the show cause hearing, a contempt of court warrant may have been issued. If a warrant was issued; however, the administrator testified that enforcement would be "in the same position that we would be with the larger list." See n 4.

Further, these hearings supplied details about Kent County's population. According to the 1990 census, 8.1 percent of Kent County's population is black, though black adults between the ages of eighteen and sixty-nine comprised 7.28 percent of the county's population. The city of Grand Rapids, within Kent County, however, had a black population of 18.5 percent. Moreover, testimony indicated that minorities are generally underrepresented in census counts, though to what degree is not known.

Next, and more pertinent, the hearings provided details about the composition of Kent County Circuit Court jury pools when defendant's jury was chosen. An expert statistician reported that from April to October 1993, 929 prospective jurors were selected from the Secretary of State lists. On the basis of the 7.28 percent jury-eligible black population in Kent County, he reported that sixty-eight of the 929 prospective jurors could be expected to be black. However, he reported that only fifty-six black prospective jurors were selected to the list of 929.[8] The trial court accepted the expert's figures as fact.

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[8] The statistician also offered an analysis of the April- October 1993 data in. six four-week periods, roughly approximate to the months April through September 1993. For period one, eleven black prospective jurors could be expected, but only 8 were present. The remaining periods were as follows: second period, eleven expected, twelve present; third period, eleven expected, six present; fourth period, eleven expected, eleven present; fifth period, twelve expected, eleven present; and sixth period, in which defendant's trial fell, twelve expected, eight present. These figures, as well as those in the text, have been rounded to the nearest whole prospective juror.

Finally, testimony at the hearing offered some observations on the Kent County jury selection system. Apparently, minority jury representation in Kent County has long been a problem, with few black prospective jurors appearing in jury pools. Similarly, testimony suggested that statutory exemptions based on felony sentences, or personal exemptions based on lack of child care or transportation, would result in a disproportionate number of minority juror exemptions because minorities are disproportionately affected by these concerns.

After the close of the hearings, the trial court concluded that defendant had not shown that he was denied his right to an impartial jury drawn from a fair cross section of the community. The court noted that it was sympathetic to defendant's dilemma, but stated that defendant had not demonstrated that black jurors were systematically excluded from the jury pool, and that it would not presume that the district courts exhausted the supply of minority jurors. It thus left defendant's convictions in place.

Defendant appealed, and the Court of Appeals reversed.[9] The Court's majority believed that black jurors were systematically excluded from circuit court juries because "the juror allocation system in place before October 1993 drained the largest concentration of African- from the master jury list by selecting 61st District Court jury venires first." Dissenting in part, Judge HOEKSTRA noted that when Kent County began selecting circuit court jurors first, the underrepresentation of black jurors decreased only slightly, refuting the idea that the district courts were "draining" away minority jurors. He thus concluded

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[9] Unpublished opinion per curiam, issued May 7, 1999 (Docket No. 172558)

that the evidence produced failed to show a systematic exclusion of black jurors. The prosecution appealed, and this Court granted leave. 461 Mich 896 (1999).

II

The Sixth Amendment of the United States Constitution guarantees criminal defendants a trial by an impartial jury.[10] Our nation's Supreme Court has stated that the purpose of a jury is to "guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v Louisiana*, 419 US 522, 530; 95 S Ct 692; 42 L Ed 2d 690 (1975), citing *Duncan v Louisiana*, 391 US 145, 155-156; 88 S Ct 1444; 20 L Ed 2d 491 (1968). If

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[10] In its entirety, the Sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence. [US Const, Am VI.]

The Sixth Amendment applies to the states through the Fourteenth Amendment Due Process Clause. *Duncan v Louisiana*, 391 US 145, 154-155; 88 5 Ct 1444; 20 L Ed 2d 491 (1968). Our Michigan Constitution also guarantees the right to trial by jury. See Const 1963, art 1, § 14.

distinctive groups in the community are excluded from jury pools, the purposes of a jury go unserved. Therefore, the Court has not only "declared that the .American concept of the jury trial contemplates a jury drawn from a fair cross section of the community," but has required that "petit juries must be drawn from a source fairly representative of the community . . . ." *Taylor, supra* at 527, 538. Thus, the Supreme Court has "accept[ed] the fair- cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment . . . ." *Id.* at 530.

The fair cross-section requirement, however, does not guarantee that any particular jury "actually chosen must mirror the community . . . ." *Id.* at 538. Rather, the Court explained that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof," for the fair cross-section requirement to be satisfied. *Id.*

When a criminal defendant claims that this requirement has not been satisfied, the defendant must prove the three elements the Supreme Court set forth in Duren v Missouri, supra. Duren states:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic

> exclusion of the group in the jury-selection process. [*Id.* at 364.]

Although I review the lower courts' factual determinations for clear error, I review de novo the courts' legal determination of whether a prima facie violation of the fair cross-section requirement occurred. *United States v Shinault*, 147 F3d 1266, 1271 (CA 10, 1998)

A. DISTINCTIVE GROUP

Defendant easily satisfies the first prong of the *Duren* analysis. Black Americans are a constitutionally cognizable group because they are capable of being singled out for discriminatory treatment, see *Castaneda v Partida*, 430 US 482, 494; 97 S Ct 1272; 51 L Ed 2d 498 (1977), and have been held a distinctive group for jury composition challenges. See *Peters v Kiff*, 407 US 493, 498-499; 92 S Ct 2163; 33 L Ed 2d 83 (1972); see also *United States v Royal*, 174 F3d 1, 6 (CA 1, 1999) ("blacks are unquestionably a 'distinctive' group for the purposes of a fair cross-section analysis")

B. FAIR AND REASONABLE REPRESENTATION

To satisfy the second prong of *Duren*, defendant must prove that the number of prospective black jurors in the jury pool is not fair and reasonable in relation to the black population in Kent County. The United States Supreme Court has never definitively stated the means courts should use to measure whether representation of a distinctive group is fair and reasonable, and it has not indicated the constitutional boundaries of fairness or reasonableness in this context. See *Ramsey, People v Hubbard: Interpreting the fair cross-section requirement of the Sixth Amendment*, 52 Wash U J Urb & Contemp L 419, 427-

428 (1997). As a result, courts have applied three different methods of measuring fair and reasonable representation, known as the absolute disparity test, the comparative disparity test, and the standard deviation test. *Id*

This Court has not previously taken a position on this issue. Similarly, although the Court of Appeals has considered several fair-cross-section challenges, see, e.g., *People v Dixon*, 217 Mich App 400; 552 NW2d 663 (1996); *People v Flowers*, 222 Mich App 732; 565 NW2d 12 (1997), only in *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), did it reach this stage of the *Duren* analysis. The *Hubbard* Court adopted an approach different from those described above. *Id.* at 475-480. I consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual method should be used exclusive of the others. Rather, I would adopt a case-by-case approach.

1. ABSOLUTE DISPARITY

Most frequently, courts employ the absolute disparity test in Sixth Amendment cases. *Id.* In this context, absolute disparity is defined as "the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire." *Ramseur v Beyer*, 983 F2d 1215, 1231 (CA 3, 1992). Thus, to calculate absolute disparity, courts subtract the percentage of the distinctive group that was in the jury pool from the percentage present in the population. In the instant case, Kent County's jury-eligible black population was 7.28 percent. Fifty-six of the 929 prospective jurors, or six percent, were black. Thus, the instant absolute disparity was 1.28 percent. This showing is insufficient, as courts have consistently held that

absolute disparities less than 11.5 percent do not constitute unfair or unreasonable underrepresentation. *Id.* at 1232 (collecting cases).

The absolute disparity test, though frequently employed, is often criticized as well. As the United States Court of Appeals for the Second Circuit stated:

> The risk of using this approach is that it may too readily tolerate a selection system in which the seemingly innocuous absence of small numbers of a minority from an average array creates an unacceptable probability that the minority members of the jury ultimately selected will be markedly deficient in number and sometimes totally missing. Of course, the Sixth Amendment assures only the opportunity for a representative jury, rather than a representative jury itself, . . . but that opportunity can be imperiled if venires regularly lack even the small numbers of minorities necessary to reflect their proportion of the population. [*United States v Biaggi*, 909 F2d 662, 678 (CA 2, 1990).]

This problem is particularly acute when the percentage of the distinctive group eligible for jury service is small. See *United States v Jackman*, 46 F3d 1240, 1247 (CA 2, 1995). In the instant case, for example, even a complete exclusion of black jurors would result in only a 7.28 percent absolute disparity.

For this reason, the Court of Appeals declined to adopt the absolute disparity test in *People v Hubbard*. Instead, when determining whether representation of black prospective jurors was fair and reasonable, it followed the approach taken in *United States it Osorio*,

801 F Supp 966 (D Conn, 1992). There, the court found substantial underrepresentation when disparity resulted from "non-benign" circumstances, even though the disparity was insubstantial under an absolute disparity test. See *Id.* at 978-979. Basically, this approach glances ahead at the evidence of systematic exclusion, and, if it has the appearance of merit, that is a thumb on the scale when deciding whether representation was fair and reasonable.

2. COMPARATIVE DISPARITY

Courts frequently discuss the second method, comparative disparity, though they have been reluctant to adopt it. See, e.g., *United States v Hafen*, 726 F2d 21, 24 (CA 1, 1984).

"Comparative disparity is calculated by dividing the absolute disparity by the population figure for a population group. It measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Ramseur*, *supra* at 1231-1232. Here, the absolute disparity was 1.28 percent, so I divide that figure by the jury-eligible black population of Kent County, 7.28 percent, to arrive at a quotient of .18. Thus, defendant's jury pool had eighteen percent less black prospective jurors than could have been expected on the basis of the black population of Kent County. This figure also does not present the possibility of underrepresentation, as comparative disparities as large as forty percent have been held "borderline," *id*, and only comparative disparities much larger have been "indicative of a Sixth Amendment violation . . . ." *Shinault*, *supra* at 1273 ("48%, 50%, and almost 60%").

As alluded to above, however, this test has its critics as well. A problem with this analysis is that "[a]

small variation in the figures used to calculate comparative disparity can produce a significant difference in the result . . . ." *Hafen, supra* at 24. The instant case illustrates this point. For example, of the 929 prospective jurors in the pool, had twelve more been black, that is, had one percent changed, black prospective jurors would actually have been overrepresented in the pool. Thus, when the distinctive group's population is small, a small change in the jury pool distorts the proportional representation. This has led most courts to reject the comparative disparity analysis. See *Royal, supra* at 8 (collecting cases)

3. STANDARD DEVIATION

A final method of calculating whether representation is fair and reasonable is standard deviation analysis. This analysis explains the probability that the disparity between the percentages of the black population in the relevant community and black prospective jurors in the qualified jury pool is a result of random chance. To determine whether any given disparity is attributable to the variations that can occur in a random selection, courts first ascertain the standard deviation from the expected random allocation of jurors, and then compare whether the disparity is beyond that standard deviation. Courts calculate the standard deviation by multiplying the number of prospective jurors in the jury pool by the percentage of the distinct group in the population by the percentage of the population that is not in the distinct group, and then taking the square root of that product. The square root is the standard deviation. If the disparity is beyond that standard deviation, then the representation is not fair and reasonable. See *Castaneda v Partida, supra* at 496, n 17 (applying standard deviation analysis to a jury discrimination

claim arising under the Fourteenth Amendment); *Jackman, supra* at 1247, n 5; *Ramseur, supra* at 1232.

Here, defendant cannot show that the representation was not fair and reasonable under a standard deviation analysis. The jury pool consisted of 929 names, so we multiply that number by .728 (black population of Kent County), and then multiply by .972 (nonblack population of Kent County), to arrive at the product 657.38, the square root of which is twenty-six.[11] Thus, although defendant could have expected sixty-eight black prospective jurors in the qualified jury pool, the standard deviation for a purely random sample is twenty-six, so the instant allocation is not statistically significant. That is, although the juror allocation is not precisely proportionate to the Kent County population, a purely random sample could standardly produce results varying by twenty-six from the expected number, sixty-eight. Unless the number of black prospective jurors in the qualified jury pool varies from the expected number by twenty-six or more, it is not an extraordinary result based on a random selection. Therefore, the representation was neither unfair nor unreasonable under this analysis.[12]

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[11] This figure has been rounded to the nearest whole number.

[12] The majority characterizes me as "craft[ing] [my] own standard deviation analysis from the available data." Slip op at 4, n 1. However, the formula I employ to calculate standard deviation is taken from federal caselaw; the standard is stated in *Castaneda, Jackman*, and *Ramseur*. I apply that standard to the established facts, which were supported by the testimony of the expert statistician. Thus, this crafting of my own analysis is merely an application of a legal standard to established facts, as this Court does in any case.

Generally, courts have applied a standard deviation analysis in Fourteenth amendment cases, not in Sixth Amendment cases. *Ramsey*, *supra* at 428, n 59. Although courts have used standard deviation analyses in Sixth amendment cases, see *Jackman, supra; Ramseur, supra,*[13] "no court in the country has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." *United States v Rioux,* 97 F3d 648, 655 (CA 2, 1996)

4. CONCLUSION

As I have summarized, each of the methods of measuring whether representation of a distinctive group is fair and reasonable has its advantages and disadvantages. In any given case, the peculiar facts may render any method more or less appropriate, but in every case, the fair cross requirement is fundamental to the Sixth Amendment guarantee. Therefore, I would not purport to constrain Michigan courts to rigidly follow one method. Instead, I believe that courts should analyze representation under all three tests and weigh the different results to ensure that a defendant's right to a jury drawn from a fair cross section of his community is not violated, yet avoiding the pitfalls of the individual tests. Other courts have also analyzed these claims under more than one method, or have acknowledged that such an analysis could be useful. See *Ramseur*, *supra* at 1231-1232 (using all three analyses); *People v Sanders*, 51

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[13] Notably *Ramseur* involved both an equal protection claim under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 I Ed 2d 69 (1986), and a Sixth Amendment claim under *Duren*. The *Ramseur* court analyzed the claims together, stating that the requirements of each claim are comparable. *Id.* at 1230.

Cal 3d 471, 492-493; 797 P2d 561 (1990) (absolute and comparative disparity); *Jackman*, *supra* at 1247, n 5 (absolute disparity and standard-deviation-like analysis); *Hafen*, *supra* at 24 ("comparative disparity calculation might be a useful supplement to the absolute disparity calculation in some circumstances")

Further, the approach taken by the Court of Appeals in *People v Hubbard* is relevant to a determination whether unfair and unreasonable underrepresentation has been shown. Under this approach, a court may glance ahead at the evidence of systematic exclusion when deciding whether representation of the distinctive group is fair and reasonable. When the showing of underrepresentation is close, or none of the methods of analysis are particularly well-suited to a case, a court can consider the defendant's evidence of systematic exclusion. If a jury selection process appears ex ante likely to systematically exclude a distinctive group, that is, the system contains "non-benign" factors, a court may essentially give a defendant the benefit of the doubt on underrepresentation, even if the system ex post proves to work no systematic exclusion. I agree with *Hubbard* and other courts that have dealt with the shortcomings of each of the methods of analyzing representation in this manner. See *Ramseur*, *supra* at 1235; *Biaggi*, *supra* at 678; *Osorio*, *supra* at 978-979.[14]

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[14] The majority does not approve of my even discussing the decision of the Court of Appeals in *Hubbard* because that case "has not been briefed or considered by this Court." Slip op at 4, n 1. Throughout defendant's brief to this Court, though, he urged us to follow *Hubbard*, and at oral argument, the prosecutor addressed the case at length, and conceded, "I would say you [the Court] have to look at *Hubbard* for guidance." I disagree, then, that we have not been presented with or considered *Hubbard*. Even though

In the instant case, defendant has not shown underrepresentation under either the absolute disparity test, the comparative disparity test, or standard deviation analysis. Under each approach, the underrepresentation in this case was below levels that have been held unfair and unreasonable. However, because the jury-eligible black population of Kent County is small, and the sample of the overall population represented by the jury pools is also small, none of the analytical methods are particularly well-suited to defendant's case. Further, the facial similarity between the jury selection system in the instant case and the system held constitutionally impermissible in *Hubbard* is a thumb on the scale when weighing underrepresentation. Thus, although defendant has not shown unfair and unreasonable underrepresentation under the disparity analyses above, the jury selection, process bears the mark of a "non-benign" influence. Leaving this possibility of systematic exclusion unreviewed because the disparities in this case were not large creates the possibility that a systematic exclusion could be acceptable if only its effects were small enough. To prevent this, under the approach taken in Hubbard, I would give defendant the benefit of the doubt on underrepresentation, and glance ahead to the third prong of the *Duren* analysis.

B. SYSTEMATIC EXCLUSION

As a final step in establishing a fair cross-section violation, defendant must show that the underrepresentation of black jurors was systematic, "that is, inherent in the particular jury-selection process utilized." *Duren*, *supra* at 366. Like the trial

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Hubbard was addressed by the parties, the majority would apparently prefer to decide this case without acknowledging existing Michigan law on this point.

court and the dissenting judge in the Court of Appeals, although I am sympathetic to defendant's position, I simply am not persuaded that defendant has carried his burden on this step. Therefore, because I had considered defendant's challenge under the "glancing ahead" approach of *Hubbard*, he has similarly failed to carry the second step of the *Duren* analysis.

1. "SIPHONING"

Defendant primarily argues that the selection of district court jurors before circuit court jurors systematically excluded black jurors from the circuit court pool. By first allocating jurors for district courts in the city of Grand Rapids, with its 18.5 percent black population, and other district courts in Kent County, he contends that most of the available black jurors were siphoned away from the circuit court jury pools. He compares his case to People v Hubbard, supra, in which prospective jurors were sent a questionnaire for either district court only or circuit court only depending on their residence. In that case, the defendant showed that this preselection for district court was directing seventy-five percent of black prospective jurors in the county to district court, with only the remaining twenty-five percent available for circuit court. The Court of Appeals held this to be a systematic exclusion. *Id.* at 480-482.

Although the instant case and *Hubbard* have facial similarities, defendant has not shown the effect that similarity had on his case. In *Hubbard*, testimony established that seventy-five percent of jury-eligible black adults were excluded from circuit court jury service because of the allocation system. Here, however, defendant has not shown how the alleged siphoning of black jurors to district court affected circuit court juries. No evidence has shown that district court juries contained more, fewer, or a

number approximately equal to the number of minority jurors appearing in circuit court. Defendant has the burden of proof on this issue, but has left me to my own speculation.[15] He thus has not carried his burden of proof.

By holding that defendant has not carried his burden on this issue, I do not condone the practice of selecting district court jurors before circuit court jurors. Such a system was shown to work a constitutional violation in *Hubbard*. Here, though, defendant has simply failed to show that Kent County's former practice effected a constitutional violation.

2. DISPARATE EFFECTS

Defendant secondly asserts that the system contained factors that could be anticipated to disparately affect black prospective jurors, yet failed to account for that disparate effect. For example, defendant argues that Kent County could anticipate that questionnaires returned as undeliverable would more likely have been returned from an area with a large minority population. Similarly, he argues that minorities are more likely to be nonresponsive to juror questionnaires, and Kent County' s failure to effectively pursue nonresponsive questionnaire recipients leads to a smaller number of prospective black jurors. He further asserts that allowing excuses for personal reasons, like lack of child care or

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[15] Even as a matter of peculation, and as the dissenting judge below noted, after Kent County stopped selecting district court jurors first, the change in the representation of black jurors in circuit court was small, suggesting that the alleged systematic exclusion was not the cause of the underrepresentation.

transportation, also leads to a smaller number of black prospective jurors because black Americans are more likely to suffer from these types of problems.

These problems, however, are not inherent in the particular jury selection process formerly used in Kent County. First, "[t]he inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to outside forces,. such as demographic changes." *Rioux*, *supra* at 658. Kent County is not required to account for demographic changes in its jury selection process; all that is required is that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups . . ." *Taylor*, *supra* at 538.

Similarly, defendant's argument based on Kent County's decision not to pursue prospective jurors that did not return questionnaires fails because it does not address whether a distinctive group was excluded from jury pools. Whether systematic underrepresentation is present "turns on the process of selecting venires," *Jackman*, *supra* at 1248, and here questionnaires were sent to a random list of names. The manner in which the venire was selected, then, was random. Defendant's suggestion that more was necessary amounts to a request for extra-constitutional action, and Kent County "does not have an obligation under the Sixth Amendment to affirmatively counteract 'private sector influences' . . . ." *United States v Purdy*, 946 F Supp 1094, 1104 (D Conn, 1996) (holding that a failure to send follow-up jury questionnaires to persons that did not respond to an initial questionnaire was not a constitutional violation). Relevant to this argument as well is defendant's failure to show that any of the persons that did not respond were black.

Defendant's contention that exemptions based on personal reasons were a systematic exclusion of black prospective jurors fails as well. Initially, persons granted exemptions were racially unidentified, so the suggestion that granting personal exemptions resulted in fewer black prospective jurors is, at best, supported by generalized testimony. The exemptions could have resulted in fewer white prospective jurors, fewer black prospective jurors, or no change in the jury pool make-up whatsoever. Further, defendant's suggestion that black prospective jurors would be more likely to request personal exemptions is again attributable to outside social forces rather than systematic exclusion of black prospective jurors, and again Kent County was not required to affirmatively counteract outside forces. Also, exemptions based on personal hardship have been held permissible even when the exempted prospective juror's race was known, and the prospective juror was a member of a distinct group. *People v Howard*, 1 Cal 4th 1132, 1160-1161; 824 P2d 1315 (1992) (holding that exemptions for hispanic prospective jurors because of doctor's appointments, loss of income, and difficulty being absent from work were not constitutional violations) . Therefore, this argument is also not persuasive.

I reiterate that "a finding that . . . disparities are not unconstitutional is not the same as an endorsement of such discrepancies." *United States v Reyes*, 934 F Supp 553, 566 (SD NY, 1996). Defendant's arguments should give pause to anyone who suggests that black Americans have achieved socio-economic parity with white Americans. However, defendant's arguments just do not demonstrate that Kent County's jury selection process systematically excluded black prospective jurors.

3. STATISICAL PROOF

Finally, defendant argues that the statistics alone sufficiently show that black prospective jurors were systematically excluded from Kent County jury pools. He contends that the persistent underrepresentation shows that random chance could not have produced such a result.

In *Rioux*, *supra*, the Second Circuit Court of Appeals confronted a similar claim that statistics alone prove systematic exclusion. That court stated: "Without accepting the canard that if you torture the statistics long enough, they'll say anything you want them to, it remains unclear whether statistics alone can prove systematic exclusion. Even if they can, however, they would have to be of an overwhelmingly convincing nature." *Id.* at 658 (internal citations omitted). Several courts, however, have clearly stated that statistics alone cannot prove systematic exclusion. See *United States v Pion*, 25 F3d 18, 24 (CA 1, 1994) (holding that an allegation of systematic exclusion based on statistics alone was "pure speculation"); *United States v Garcia*, 991 F2d 489, 492 (CA 8, 1993) (holding that numerical underrepresentation is not a proxy for systematic exclusion); *Howard*, *supra* at 1160 ("A defendant cannot carry this burden with nothing more than statistical evidence of a disparity. One must, in addition, show that the disparity is the result of an improper feature of the jury selection process")

Even presuming that defendant could rely exclusively on statistics, he has not made an adequate showing. In Duren, the Court noted that the defendant proved that a large discrepancy was occurring in every weekly venire for a period of nearly a year. *Duren*, *supra* at 366. Here, defendant's proof may satisfy any duration requirement, because there was some underrepresentation in five of the six periods

surveyed, but the disparities over that time were nowhere near as large as those in *Duren*. The absolute disparity in *Duren* was thirty-nine percent, and the comparative disparity was sixty-five percent.[16] In the instant case, defendant could not make a showing of unfair and unreasonable underrepresentation under any of the disparity analyses. Thus the defendant's statistics are not so "overwhelmingly convincing." Without a showing that the disparity was "the result of an improper feature," *Howard, supra* at 1160, defendant cannot prevail.

III

Because defendant has not made the requisite showings under *Duren v Missouri,* I would reverse the decision of the Court of Appeals. I would remand this case to the Court of Appeals for consideration of defendant's issues that were not previously reviewed.

s/*Michael F. Cavanagh*
s/*Marilyn Kelly*

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[16] In *Duren*, the distinctive group comprised fifty-four percent of the population, but only fifteen percent of the jury pools. *Id.* at 365. Applying the formulas detailed in part 11(B) supplies the figures mentioned in the text. Standard deviation is not available because the data necessary for the calculation were not supplied in the Court's opinion in *Duren*.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED May 7, 1999
Plaintiff-Appellee,	
v	No. 172558 Kent Circuit Court
DIAPOLIS SMITH,	LC No. 92-060735-FC
Defendant-Appellant.	AFTER REMAND

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b: MSA 28.424(2), but it acquitted him of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and a second count of felony-firearm. The court sentenced defendant to life imprisonment on the murder conviction and to two years' imprisonment on the felony-firearm conviction to be served consecutively to a sentence defendant was then serving due to his status as a parolee. The life sentence would then be sewed consecutively to the felony-firearm sentence.' Defendant appeals by right.[1] We reverse and remand.

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*Circuit judge, sitting on the Court of Appeals by assignment.

FACTS

Defendant's conviction arises out of a shooting death at So-So's Lounge in Grand Rapids. Shortly before 1 a.m., the decedent quarreled with another male bar patron identified by some witnesses as defendant and by other witnesses as someone else. This quarrel soon escalated into a physical confrontation with both parties participating. The decedent was struck with a glass or beer bottle, hit on the head with a pistol butt, and kicked. As many as five other mates joined in the fight and struck the decedent; several witnesses identified defendant as one of the men who joined the fight. Although several witnesses testified that defendant displayed a handgun during this confrontation, struck the decedent with the butt of the gun and fired between two and six shots, other witnesses testified that someone else fired the fatal shot. The fatal bullet pierced the decedent's chest, heart, pancreas and large intestine before exiting his back, causing him to bleed to death in three minutes. The bullet also pierced the thigh of So-So's bouncer who was attempting to break up the fight.

Although plaintiff voluntarily dismissed the charges following the preliminary examination, a one-person grand jury indicted defendant on open murder, assault with intent to do great bodily harm less than murder, and two counts of felony-firearm.

Defendant raises twenty-one issues on appeal. Our resolution of several issues renders moot the balance.

Here, in contrast to *People v Hubbard*, 217 Mich App 459, 463; 552 NW2d 493 (1996), defendant did not create an evidentiary record in the trial court regarding the workings of the Kent County jury

selection process.[2] This Court, on its own motion, remanded the case to the Kent County Circuit Court for an evidentiary hearing to determine how jury venires were selected at the time of defendant's trial.

Defendant's jury selection began September 13, 1993. At the evidentiary hearings, the Kent County Circuit Court Administrator testified that the juror list for defendant's jury would have been compiled in May and June 1992 for jury trials conducted from October 1, 1992 through October 1, 1993. From October 1, 1993 through October 1, 1994, the year after defendant's jury was selected, the Circuit Court Administrator's Office made several changes in the jury selection process, including requesting from the Secretary of State the entire driver's license list and identification card list for Kent County. Previously, it had merely requested a certain number of names. Before October 1, 1993, jurors were first selected from the master juror list for 61 District Court, the City of Grand Rapids, and the other Kent County District Courts, 59, 62A, 62B, and 63, Divisions 1 and 2. Districts 61, 62A and 62B contained the largest concentration of minority residents. The remaining city and county residents on the master list were available for the circuit court jury pools.

After October 1, 1993, jurors were selected first for the Kent County Circuit Court's jury pools.[3] According to the Court Administrator, this change was made because

> [t]he belief was that the respective districts essentially swallowed up most of the minority jurors, and Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just—it represented certain portions of the county.

Furthermore, once citizens were called to serve on district court juries, they would be ineligible to serve as circuit court jurors for the following twelve months.

Notably, because there was no way of identifying a potential juror's race, the Court Administrator's Office took no steps to compensate for minority jurors who were statutorily excluded from jury duty because they were under sentence for a felony conviction[4] or for those who, once they were summoned to jury duty for a given month, were excused. Neither the information that the Secretary of State provided nor the juror questionnaires asked for any information concerning race. Moreover, minorities often failed to return the juror questionnaires or sought and received an excuse from service for lack of transportation, child care, or some other hardship, thereby excluding themselves from the pool of potential jurors. After a City High School government class study of the Kent County juror selection process, the Court Administrator's Office took affirmative steps to mandate and improve the return of juror questionnaires and to compel attendance for jury duty. Again all of these changes were instituted for the jury year after defendant's jury was selected, i.e., October 1993 to October 1994.

Richard Hillary, the director of the Kent County Public Defender's Office, who has practiced for eighteen years exclusively in Kent County Circuit Court and who serves as co-chair of the Jury Minority Representation Committee of the Grand Rapids Bar Association, testified that he had conducted over 130 felony jury trials in circuit court. He stated that minority representation on juries in Kent County has been a "consistent problem" and that "98 percent of the time we had all-white juries."

> Back prior to 1993, or even halfway through '93 and up to '94, I recall there being very few, if any, minorities, specifically black potential jurors at all. Traditionally, they would bring down approximately 150 jurors to serve for that month, sometimes as high as 175. During that time period, my recollection was that if you saw two or three blacks out of the 150 or 175, that would be about the maximum.[5]

Hillary also testified that after some months of study, the Jury Minority Representation Committee was concerned about qualified jurors being selected first for district court jury duty before changes were made effective October 1, 1993. According to Hillary:

> [I]n the city areas which the District Courts encompass, are your highest percentage of minorities, and the concern was that we were pulling out numbers for the District Court, the District Court would select first. and then not even return the unused ones to the Circuit Court panel And we made a determination that we were losing minorities by choosing the District Court jurors first and not returning the unused ones to the . . . pool that the Circuit Court was taken from. [Emphasis added]

One statistician also testified regarding the underrepresentation of minorities on Kent County jury venires and provided several reasons that could explain this problem. Dr. Michael Stoline, a professor of mathematics and statistics at Western Michigan University, testified that according to statistical estimates and models for the time period April 1993

through October 1993, minorities were underrepresented in jury pools by 34.8 percent. Dr. Stoline believed that the underrepresentation of blacks in Kent County jury lists was a result of the tendency for more jurors to be selected from those Kent County census tracts that contained proportionately more white adults, and fewer jurors were selected from those census tracts that contain relatively more black adults.[6]

Kurt Metzger, program director for the Michigan Metropolitan Information Center (MIMIC) and a fifteen-year employee with the United States Census Bureau, testified that African-Americans were undercounted in the 1990 census at a rate of six to one in comparison with white Americans. Also undercounted are renters, unmarried household members, and people living in poverty, categories of which contain a greater ratio of blacks.[7]

The evidence presented on remand also revealed that pursuant to the 1990 census, black adults in Kent County ages 18 through 69 (i.e., those adults eligible to sit on juries) comprised 7.28% of the county's population. The percentage of black, non-hispanic adults in the City of Grand Rapids per the census equaled 18.1%, however.

I

First, defendant argues that the jury selection was unconstitutional because blacks were underrepresented in the jury venire, thereby violating his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community, and the court improperly refused his request for twelve additional peremptory challenges, per MCR 6.412, in order to attempt to seat blacks on the jury. Defendant properly preserved his Sixth Amendment claim for

appeal by raising it in an oral motion before the jury was impaneled and sworn. *Hubbard, supra* at 464-465.

We review de novo questions regarding the alleged systematic exclusion of minorities from jury venires. *Id* at 472. As this Court observed in *Hubbard, supra* at 473:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venues from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri,* 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant automatically satisfies the first prong of the *Duren* test because blacks are considered a constitutionally cognizable group for a Sixth Amendment fair-cross-section analysis. *Hubbard, supra* at 473. For the second prong, defendant must show that a distinctive group is substantially underrepresented in the jury pool. *Id.* at 473-474. To satisfy the third prong, defendant must show that the underrepresentation of this distinctive group was due to systematic exclusion, i.e., "an exclusion resulting from some circumstance inherent in the particular jury selection process used." *Id* at 481.

Based upon the record before us, we also find under the second prong of the *Duren* standard that the

representation of blacks in venires from which juries were selected for Kent County Circuit Courts was at the time, i.e., before October 1, 1993, not fair and reasonable in relation to the number of such persons in the community. As in *Hubbard, supra* at 480-481, the evidence produced on remand revealed that the juror allocation process used in Kent County before October 1, 1993, not random selection, caused the underrepresentation. One master list was compiled for all the courts in Kent County, both district and circuit. When defendant's jury was selected under the "old system," the Court Administrator's Office employed a system of first allocating the residents of the City of Grand Rapids to the juries needed for the 61st District Court.[8] There are six judges in the 61st District Court, and only City of Grand Rapids residents are permitted to sit on juries before each of these judges. The cities of Wyoming and Kentwood, where the next highest percentage of minorities reside, have two and one district court judges, respectively. Their residents are the only ones permitted to sit on their district court juries, also.

Under the "old system," once the jury list for the 61st District Court was filled, those City of Grand Rapids residents not allocated to district court juries remained on the master juror list and, consequently, were available for allocation to the circuit court juries. The same process applied to the other district courts. There are seven judges in Kent County's 17th Circuit Court. Moreover, merely by giving the 61st District Court priority over the 17th Circuit Court, the juror allocation process guaranteed that the number of city residents available for allocation to circuit court juries was significantly less than the city's representation in the county's general population. Accord *Hubbard, supra* at 480.

> Moreover, the largest population of African-Americans residing in the county reside in the City. . . .Consequently, by guaranteeing that the residents of the City. . . would be substantially underrepresented in the circuit court venires, the allocation system guaranteed that African-Americans residing in the City likewise would be underrepresented. [*Hubbard, supra* at 480-481.]

Accordingly, the underrepresentation of minorities in the jury array available to defendant did not result from "benign" random selection but instead resulted from a defect inherent in the juror allocation process that Kent County used under the pre-October 1993 system. *Hubbard, supra* at 481. Thus, the undisputed anecdotal evidence regarding the 98% all-white juries during this time period and the statistical evidence that census tracts containing the greatest number of black adults were consistently first culled for 61st District Court and the other urban district courts substantiates the allegation that blacks were underrepresented in Kent County Circuit Court jury venires. Consequently, we conclude that defendant has satisfied the second prong of the *Duren* test.

With respect to the third prong of the *Duren* test, defendant has also established that the underrepresentation of the distinctive group was due in part to systematic exclusion, i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process. *Hubbard, supra* at 481. As already noted, the evidentiary record establishes that the juror allocation system in place before October 1993 drained the largest concentration of African- Americans from the master jury list by selecting 61st District Court jury venires first. Although Dr. Stoline did not present a statistical

analysis for juries seated before October 1993, we are constrained to conclude that African-Americans were significantly underrepresented on circuit court jury venires during the applicable time period.[9]

In conclusion, we find that the trial court abused its discretion in determining that defendant had not been deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. Defendant is therefore entitled to a new trial with a jury selected from a venire as now generated: properly comprised of all Kent County residents, including City of Grand Rapids residents, who are first allocated to the circuit court juries, not the district court juries within the county. *Hubbard, supra* at 482.

In addition, we adopt the same rule regarding the limited precedent that this case may establish as set forth in *Hubbard, supra* at 482:[10]

> Having concluded that the Kalamazoo County jury array procedure was systemically flawed between the mid-1980's and 1992, we further conclude that this decision shall have retrospective application only to the extent of direct appeals currently pending, or filed after the issuance date of this decision, where the jury array issue was specifically and seasonably raised in the trial court and properly preserved for appellate review. We further caution the bench and bar, however, that this decision should not be interpreted as warranting reversal per se of an otherwise valid conviction obtained in the Kalamazoo Circuit Court during the time when the flawed jury array

procedure was in use. Each case must be decided on its own merits.

II

"Because of the dispositive nature of our resolution of the Sixth Amendment challenge, we limit our remaining discussion to those claims properly preserved and presented to this Court for resolution and necessary to guide the trial court and the parties on retrial." *Hubbard, supra* at 483.

Defendant further argues that the police improperly secured information from defendant's confidential medical records maintained at the prison where defendant had been incarcerated in the past. Because the police violated the physician-patient privilege, defendant's identification was tainted and should have been suppressed. We find defendant's arguments unpersuasive.

First, any attempt by defendant to employ a "fruits of the poisonous tree" analysis to the case at bar must fail. As our Supreme Court observed in *People v Kusowski,* 403 Mich 653, 671 n 9; 272 NW2d 503 (1978), the "fruit-of-the-poisonous-tree" exclusionary rule requires exclusion of the tainted "fruits" of police conduct that abridges constitutional rights, pursuant to *Wong Sun v United States,* 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). Defendant points to no case law supporting the proposition that the alleged physician-patient privilege he asserts in this case is a "constitutional right." Rather, this privilege has its basis in common law and has been codified in MCL 600.2157; MSA 27A.2157.[11] Absent the violation of a constitutional right, however, the "fruit-of-the-poisonous-tree" exclusionary rule does not apply. Accord *People v Melotik,* 221 Mich App 190, 199; 561 NW2d 453 (1997) ("a *Miranda* violation does not

necessarily involve the violation of the constitution, and, thus, the fruit of the poisonous tree doctrine enunciated in *Wong Sun* is not controlling where a *Miranda* violation is involved"). Therefore, we find no taint sufficiently pervasive to suppress defendant's identification and/or serve as a basis for reversing his conviction.

We also find that any alleged patient-physician privilege that defendant may have had with the doctors who treated him while incarcerated at the Chippewa Correctional Facility is not implicated in this case. As stated in MCL 600.2157; MSA 27A.2157 protects from disclosure any information that the physician has "acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician." The purpose of this privilege is to protect the doctor-patient relationship, to enable persons to secure medical aid without betrayal of confidences, and to encourage free discussion between doctors and their patients, including a fill disclosure of symptoms and conditions. *Swickard v Wayne Medical Examiner,* 438 Mich 536, 560; 475 NW2d 304 (1991); *Domako v Rowe,* 438 Mich 347, 354; 475 NW2d 30 (1991). As a general proposition, to determine whether the physician-patient privilege applies, this Court looks, in part, to the reasons an individual has presented himself to the medical provider for examination or consultation and assesses whether those reasons demonstrate that the individual was there to receive medical advice or care under circumstances giving rise to a reasonable expectation that the examination or consultation is cloaked in a veil of confidentiality. *VanSickle v McHugh,* 171 Mich App 622, 626-627; 430 NW2d 799 (1988). Because the privilege belongs to the patient, neither the doctor nor a hospital can release a patient's medical records or information enclosed within the records without a

patient's consent. *People v Wood,* 447 Mich 80, 89; 523 NW2d 477 (1994); *Popp v Crittenton Hospital,* 181 Mich App 662, 665; 449 NW2d 678 (1989); *Osborn v Fabatz,* 105 Mich App 450, 456; 306 NW2d 319 (1981).

In the case at bar, we find that the alleged privilege was not implicated because Chippewa Correctional Facility's prison hospital did not release to the detective information acquired in attending to defendant as a patient or information necessary to treat defendant, as the physician- patient statutory privilege requires.

Here, Grand Rapids Police Detective Thomas Lyzenga testified that he received a tip from a parolee that the person responsible for shooting the victim was known as "Baby D" and had been hospitalized at the Chippewa Correctional Facility for a broken hand in the spring of 1991 during the same time that the parolee was hospitalized for a dislocated ankle. Lyzenga testified that he called the prison hospital at Chippewa and asked the staff person to check the hospital's records to determine when the parolee had been treated for his dislocated ankle. The hospital confirmed the parolee's date of hospitalization, checked for another prisoner being treated at the same time for a broken hand, and informed Detective Lyzenga of defendant's name and date of birth. The parolee then selected defendant's mug shot from a group of photos. The next day, Detective Lyzenga secured an arrest warrant for defendant.

Detective Lyzenga testified that his sole purpose for contacting the prison hospital was to learn defendant's identity. Lyzenga received no details regarding defendant's treatment or medical condition because it "wasn't germane to my investigation." Lyzenga conceded that he secured defendant's name

and date of birth from the hospital without a search warrant, court order, or defendant's authorization.[12]

Although we find no cases directly on point and defendant provides none for us, we believe that the detective neither sought nor received *medical* information regarding defendant *from* the prison hospital. Indeed, the parolee told Detective Lyzenga that "Baby D" broke his hand and was treated at the prison on the same day the parolee was treated. Defendant's name did not constitute medical information necessary for defendant's treatment at the hospital. *Accord Porter v Michigan Osteopathic Hospital Ass'n, Inc*, 170 Mich App 619, 621-623; 428 NW2d 719 (1988) (the names and addresses of suspected patient-assailants who raped another patient of defendant hospital did not result in the disclosure of information necessary for patient treatment or diagnosis; thus, no violation of the physician-patient or psychiatrist-patient privilege was found).[13] Therefore, we find that even if a physician-patient privilege existed, which we do not decide on appeal, the information that Chippewa Correctional Facility gave to Detective Lyzenga did not implicate or violate any privilege because it was not necessary to enable the prison hospital or physician to prescribe treatment for defendant. MCL 600.2157; MSA 27A.2157; *Porter, supra*.

Accordingly, we find that the trial court did not clearly err in denying defendant's motion to suppress defendant's identification as we are not left with a definite and firm conviction that a mistake has been made. See *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

III

Finally, defendant argues that the one person grand jury exceeded its statutory authority when it subpoenaed defendant to appear in a lineup, and this unlawful seizure requires suppression of the fruits of the lineup. We disagree.

While we review a trial court's ruling on a motion to suppress evidence on legal grounds for clear error, *McElhaney, supra,* we review *de novo* defendant's claim that a grand juror exceeded the juror's statutory authority. See, e.g., *People v Weathersby*, 204 Mich App 98, 104- 107; 514 NW2d 493 (1994).

In the case at bar, Kent Circuit Judge H. David Soet was appointed to act as a one person grand jury pursuant to MCL 767.3 *et seq.*; MSA 28.943 *et seq.* to investigate a series of criminal activities, including the shooting death of the victim at So-So's Lounge in Grand Rapids. During the course of his investigation, Grand Juror Soet issued a "Grand Jury Subpoena" to defendant stating in pertinent part:

> YOU ARE HEREBY COMMANDED AND SUMMONED TO APPEAR before the GRAND JURY FOR THE COUNTY OF KENT, at the Detective Bureau of the Grand Rapids Police Department, 333 Monroe NW, in the City of Grand Rapids, County of Kent, State of Michigan, to participate in a lineup at the Kent County Sheriff's Department, on Wednesday, the 9 day of December, 1992, at 12:30 O'clock/P.M. of that day in a certain Grand Jury proceeding now pending; if this subpoena is disobeyed,

> you will be deemed guilty of Contempt of Court.

The trial court denied defendant's motion to suppress the identifications that occurred at this lineup upon finding that the one man grand jury had the "inherent power to order a line-up." The court found that "[a] line-up can be of benefit to a person being investigated by a grand jury and could be used to exonerate the person being investigated. Line-ups are a necessary part of the investigatory process of the grand juror."

The one person grand jury is a creation of statute and draws its extraordinary powers from statute.[14] MCL 767.3-MCL 767.6; MSA 28.943-MSA 28.946; *GTE North, Inc, v Public Service Comm'n*, 215 Mich App 137, 154; 544 NW2d 678 (1996). Thus, we look to the authority that the statute confers on the one person grand jury to determine whether Grand Juror Soet overstepped his boundaries. *Id.*

MCL 767.3; MSA 28.943 grants the one person grand juror certain extraordinary powers, including subpoena power to

> require such persons [able to give any material evidence respecting the crime or offense under investigation] to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order. . . . The proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony.

Any witness that neglects or refuses to appear in response to a summons or to answer any questions posed by the one person grand jury may be found in contempt of court. MCL 767.5; MSA28.945.

Upon reviewing the lengthy statutory provisions found at MCL 767.3-MCL 767.6; MSA 28.943-MSA 28.946, it appears that the Legislature only made express reference to the one person grand jury's power to gather evidence in a testimonial form.[15] For example, MCL 767.3; MSA 28.943 and MCL 767.4-.4a; MSA 28.944-.944a also repeatedly employ the terms "testify" and "testimony" as they detail the grand juror's general responsibilities and authority. Although the statute does not define these terms, Black's Law Dictionary (6th ed), p 1478 defines "testify" as "[t]o bear witness; to give evidence as a witness; to make a solemn declaration, under oath or affirmation, in a judicial inquiry, for the purpose of establishing or proving some fact," and defines "testimony" as "[e]vidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources." According to the plain and ordinary meaning of these words, we believe that the one person grand jury statutes manifest the Legislature's intent to bestow upon the one person grand jury the power to gather oral evidence under oath or affirmation from individuals under subpoena to appear before the grand juror. This intent is similarly manifested in the statutory provisions that contain repeated references to answering questions posed in the grand juror's presence.

We must still determine, however, whether the Legislature intended to confer upon the grand juror the power to compel the production of physical evidence. Although the express mention of one thing in a statute implies the exclusion of other similar things,

United States Fidelity & Guaranty Co v Amerisure Ins Co, 195 Mich App 1, 6; 489 NW2d 115 (1992), we will not apply this rule of statutory construction if its application would defeat legislative intent, *Terzano v Wayne County*, 216 Mich App 522, 526-527; 549 NW2d 606 (1996).

The statutory language at issue neither empowers nor prohibits the one person grand jury to demand physical evidence from witnesses. We believe, nevertheless, that MCL 767.3, MCL 767.4 and MCL 767.4a contain language evidencing a Legislative intent that the powers conferred upon the one-person grand jury were meant to augment broad investigatory powers that the Legislature presumed to attend the office of the grand juror, the fill extent and limitations upon which the Legislature left to the courts to determine. These statutory provisions contain terms and phraseology broad enough to constitute references to physical evidence.

For example, MCL 767.3; MSA 28.943 requires that the judge appointing the grand juror must have probable cause to suspect that "any persons may be able to give any material evidence" (emphasis added). MCL 767.4; MSA 28.944 uses the term "evidence" four times, and "evidence" is defined as " writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Black's Law Dictionary (6th ed), p 555. These statements acknowledge the fact that the grand juror has traditionally possessed investigatory powers to compel the production of testimonial as well as nontestimonial evidence. This acknowledgment is consistent with the long-recognized principle that a judge conducting a one-person grand jury proceeding is acting in a judicial capacity as an arm of the court, *In re Colacasides*, 379 Mich 69, 93; 150 NW2d 1 (1967); *In re Slattery*, 310 Mich 458, 466-467; 17 NW2d 251

(1945), and is invested with various powers of the court that impaneled the grand jury to compel production of physical evidence, LaFave & Israel, Criminal Procedure, Ch. 8, § 8.3, pp 353-354. It is also consistent with the broad and historically-grounded principle that, although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the public has the right to every man's evidence except for those persons protected by constitutional, common-law or statutory privilege. *United States v Dionisio*, 410 US 1, 9-10; 93 S Ct 764; 35 L Ed 2d 67 (1973); *Branzburg vHayes*, 408 US 665, 688; 92 S Ct 2646; 33 L Ed 2d 626 (1972).

In *Dionisio*, *supra* at 2-5, the United States Supreme Court was asked to determine whether a grand jury could use its subpoena power to compel individuals to provide voice exemplars without violating the protections of the Fourth Amendment. The Court first observed that "[c]itizens generally are not constitutionally immune from grand jury subpoenas." *Id.* at 9, citing *Branzburg*, *supra* at 682. In addressing the claimed constitutional violation, the US Supreme Court began by observing that it had to conduct a two-part inquiry:

> [T]he obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels -- the "seizure" of the "person" necessary to bring him into contact with government agents, see *Davis v Mississippi*, 394 US 721; 89 5 Ct 1394; 22 L Ed 2d 676 [1969], and the subsequent search for and seizure of the evidence. [*Id.* at 8.]

First, the Court determined that the inconvenience and burden of being forced to appear

before a session of the grand jury or elsewhere for the purpose of providing a voice exemplar did not transform compliance with a grand jury subpoena into a "seizure" under the Fourth Amendment so long as the grand jury's investigative powers were not abused or used as an "instrument of oppression." *Id.* at 9-10. See also *United States v Mara*, 410 US 19, 21; 93 S Ct 774; 35 L Ed 2d 99 (1973). "[A]lthough the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public. . . has a right to every man's evidence,' except for those persons protected by a constitutional, common law, or statutory privilege, is particularly applicable to grand jury proceedings." *Dionisio*, *supra* at 9, quoting *Branzburg*, *supra* at 688.

Regarding the second level of analysis, the Court concluded that a claim of unconstitutional seizure could not rest on the defendant's being forced to disclose physical characteristics such as the tone and manner of a person's voice.[16] *Dionisio*, *supra* at 6, 14-15. In *Mara*, *supra* at 21-22, the Supreme Court also held that the Fourth Amendment is not violated by a grand jury directive compelling the production of physical characteristics that are constantly exposed to the public, including handwriting. According to the Supreme Court in *Dionisio*, *supra* at 14:

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, *any more than he can reasonably*

> *expect that his face will be a mystery to the world.* [Emphasis added.]

"Thus whatever the differences between a lineup and the production of voice exemplars, it seems clear that one has no more reasonable expectation of privacy in one's face than in one's voice, and that being forced to stand in a lineup does not result in an unconstitutional 'seizure.'" *In re Melvin*, 550 F2d 674, 676 (CA 1, 1977).

In the case at bar, defendant was compelled, in accordance with the one person grand jury's subpoena, to participate in a lineup. In *In re Melvin, supra* at 676-677, the United States Court of Appeals for the First Circuit rejected the argument that a grand jury subpoena compelling appearance at a lineup was not sufficiently burdensome to constitute a seizure of the person, and any unconstitutional "seizure" could not rest on defendant's being required to disclose physical characteristics, including his face:

> The [*Dionisio*] Court's rationale in finding that the "seizure" of a "person" necessary to bring him before the grand jury for the purpose of furnishing a voice exemplar does not implicate the fourth amendment seems controlling in the present context. Appearance at a lineup could take longer and be more distasteful, but it is difficult to see that the procedure is so much more burdensome as to be distinguishable for that reason from the ordered identification procedures accepted in *Dionisio* and *Mara*.
>
> ***
>
> The power to compel appearance at a lineup is, it is true, subject to possible

oppressive misuse. A fingerprint or handwriting or voice exemplar need only be obtained once. There is no occasion, as with a lineup, to require the witness to return and give his evidence in other investigations. One can imagine the temptation to call certain individuals with known criminal proclivities to appear repeatedly in lineups, and the absence of a standard of probable cause or reasonable suspicion adds to the potential for abuse. But many investigatory powers of the grand jury are subject to abuse, and the remedy for this problem, if it should occur, is pointed out in *Dionisio*, where the Court states:

"[T]he Constitution could not tolerate the transformation of the grand jury into an instrument of oppression . . . 'Grand juries are subject to judicial control and subpoenas to motions to quash."

410 US at 12. . . quoting *Branzburg v Hayes*, 408 US [665, 708; 92 S Ct 2646; 33 L Ed 2d 626 (1972)]. The oppressive use of orders to appear in lineups can and should be dealt with by refusal of a court to enforce the order. Here there is no suggestion of oppressive use and no need to interfere with the grand jury's power to issue the order. We conclude, therefore, that subject to the district court's continuing power and duty to prevent misuse, the grand jury is empowered to require a suspect to appear at a lineup. [*In re Melvin, supra* at 676-677; citations omitted.]

In the case before us, we find that defendant's compelled participation in the lineup did not constitute a seizure of his person for purposes of the Fourth Amendment. In light of the fact that defendant had previously appeared in a lineup in this case before he was compelled to do so again by the grand jury subpoena, we believe that defendant's participation in the lineup was not so much more burdensome as to be distinguishable from the ordered identification procedures accepted in *Dionisio, supra* and *Mara, supra*. Defendant's previous participation in a lineup significantly minimizes any stigma and humiliation that defendant may have experienced as a result of his compelled participation in the grand jury lineup. We also agree with *In re Melvin, supra*, that an individual has no more expectation of privacy in his face than in his voice because both are exposed to the public on a daily basis.

Thus, we hold that while the statutory provisions pertaining to the one person grand jury do not expressly confer the power to compel production of nontestimonial evidence, these statutes demonstrate an acknowledgment by the Legislature that the grand jury possesses traditional powers of investigation. The power to compel participation in a corporeal lineup falls within the grand jury's broad investigatory powers. And, consistent with United States Supreme Court and First Circuit precedent, we find that the one person grand jury's subpoena compelling defendant to participate in the lineup did not violate defendant's Fourth Amendment rights.

CONCLUSION

Accordingly, we reverse defendant's convictions and remand for a new trial with a jury that satisfies the Sixth Amendment guarantee of a representative cross-section of the community. We also affirm that

neither the detective's discovery of defendant's identity from the Chippewa Correctional Facility nor the one person grand jury's subpoena compelling defendant to appear in a lineup violated the Fourth Amendment. Thus, the evidence gathered as a result of these two events was properly admitted at the first trial.

We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ James C. Kingsley

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[1] The trial court dismissed the supplemental information charging defendant with fourth habitual offender status, MCL 769.12; MSA 28.1084, after finding that plaintiff failed to give notice to defense counsel of the filing of a supplemental information against defendant.

[2] Although defendant requested that this Court remand the case to the trial court for evidentiary hearings on this issue, this Court denied the request.

[3] The Court Administrator admitted that none of the changes implemented in October 1993 would have affected defendant's jury selection.

[4] Counsel asked Mr. Metzger about the fact that the black population in Michigan is approximately 13% but that the number of blacks sentenced as felons is 55%. No one challenged these figures, and Metzger said that these numbers would likely exclude more potential black jurors.

[5] Mr. Hillary also stated that since many new changes were undertaken in 1994, "there has been a noticeable increase in the number of minorities that show up" for jury duty.

[6] Dr. Stoline reached his conclusions after studying the numbers of jurors selected from each census tract, the racial composition of each census tract based upon the 1990 census figures, and the term in which those jurors were selected to serve.

[7] Metzger testified that within the Kent County black community, 64% of families with children are single parent families, whereas only 19% of the white community is comprised of single parent families. Also, 59% of blacks are renters in Kent County compared with 27% of whites. The poverty rate among blacks in the county was 31.5% versus 6.7% among whites.

[8] The greater Kent County area contains the district courts for Districts 59, 61, 62A, 62B, and 63 Divisions I and 2. Apparently, jury pools for these courts were also taken first from the master list before the circuit court juries were filled, but the district courts for other than 61st District Court did not take residents from the City of Grand Rapids. Rather, residents within each particular district area were chosen to serve on these jury venires, i.e., Kentwood residents for 62B District Court and Wyoming residents for 62A District Court.

[9] While this Court is cognizant of the problems that local courts face with respect to recruiting qualified minority jurors, we also recognize that the problem of minority underrepresentation is not one easily solved. Where more drastic measures are taken to ensure that the minority population in the community and on jury venires mirror each other, courts have struck down those efforts. For example, in *United States of America v Ovalle,* 136 F3d 1092, 1095-1098 (CA 6, 1998), the Sixth Circuit Court of Appeals struck down the jury selection program for the Eastern District of Michigan as violative of the Jury Selection and Service Act, 28

USC 1861 *et seq.* where one in five non-blacks was randomly selected to be removed from the jury wheel simply because of that person's race. Apparently, the random reduction of non-African-Americans was intended to ensure that the percentage of blacks on the qualified jury wheel closely approximated the percentage of blacks in the population. *Id.* The Hispanic defendants in *Ovalle* successfully argued, however, that qualified Hispanic jurors were being randomly removed from the jury pool because the jury selection process only recognized African Americans as a "cognizable group" within the community. *Id.* 1097, 1100. Thus, at least one defendant's conviction was reversed, and his case remanded for retrial with a properly selected jury. *Id.* at 1100.

[10] We recently faced a similar challenge to Kent County Circuit Court jury venires selected after October 1993 and decided, based on the merits of the case, that no Sixth Amendment violations occurred. See *People v Palmer (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 1999 (Docket No. 174649).

[11] MCL 600.2157; MSA 27A.2157 provides in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

[12] Although defendant argues that by releasing defendant's name, the prison hospital personnel in fact confirmed a diagnosis of a broken hand, we believe that the confirmation of such information that Detective Lyzenga already possessed from the parolee could not reasonably justify suppressing defendant's identity as a violation of any physician-patient privilege.

[13] See also *Miller Oral Surgery, Inc, v Dinello,* 611 A2d 232, 236 (Pa Super, 1992) (disclosure of names and addresses of patients being treated did not violate the physician-patient privilege); *Martinez v Pfizer Laboratories Div,* 216 Ill App 3d 360; 159 Ill Dec 642; 576 NW2d 311, 317 (Ill App 1 Dist, 1991) (disclosure of names would not violate physician-patient privilege unless the names sought were those of individuals who had particular injuries).

[14] The one person grand jury is not, however, a grand jury in the common law sense. See Bransdorfer, Power of Michigan One-Man Grand Jury to Punish Contempt 54 Mich L R 414 (1956).

[15] MCL 767.3; MSA 28.943 provides that "such judge shall require persons to attend before him as witnesses and answer such questions . . . ." MCL 767.5; MSA 28.945 indicates that a witness neglecting or refusing "to answer questions" is guilty of contempt. MCL 767.6; MSA 28.946 provides that no witness shall be required to "answer any questions . . . when the answers might tend to incriminate him," and that any grant of immunity for a witness shall be placed in a written order and supplied to the witness before he or she "shall answer such questions."

[16] No Fifth Amendment violation of the privilege against compulsory incrimination is found where the subpoena required the defendant to give a handwriting

exemplar because it, like the voice or body itself is an identifying physical characteristic outside the Fifth Amendment's protections. *Dionisio, supra* at 6-7.

SSTATEOFMICHIGAN

COURTOFAPPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED May 7, 1999
Plaintiff-Appellee,	
v	No. 172558 Kent Circuit Court
DIAPOLIS SMITH,	LC No. 92-060735-FC
Defendant-Appellant.	AFTER REMAND

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ

HOEKSTRA, P.J. (concurring in part and dissenting in part).

I concur in parts II and III of the majority's opinion; however, I would hold in part I that defendant has not satisfied the third prong of the test set forth in *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

I agree that defendant satisfied the first prong of the *Duren* test because African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross- section purposes. Moreover, I agree that defendant satisfied the second prong of the *Duren* test because the evidence produced upon remand revealed that the number of African-Americans in the venires from which juries are selected was not fair and reasonable in relation to the census numbers indicating the number of African-Americans who are living in the community. However,

my examination of the evidence produced upon remand causes me to diverge from the majority's conclusion that defendant also satisfied the third prong of *Duren*, which is that the underrepresentation of African-Americans is due to systemic exclusion of the group in the jury selection process.

In my view, the lower court did not clearly err in finding that the underrepresentation was not due to systemic exclusion of the group in the jury-selection process. Specifically, the evidence produced on remand revealed that when the court changed its process for the 1993-94 jury year from first selecting names of jurors to serve in district court to first selecting names of jurors to serve in circuit court, the underrepresentation of African Americans only slightly decreased. The statistician testified that the underrepresentation for both jury years was "very consistent." Thus, in the year after defendant's jury was chosen, no statistically significant change occurred when the system stopped "draining" the largest concentration of African-Americans from the master jury list by first selecting district court jurors.

Moreover, the evidence produced at the hearing below did not demonstrate that the underrepresentation lingering after reversal of that portion of the selection process was due to systemic exclusion of African-Americans in the jury-selection process. Rather, the evidence proffered in this regard was the testimony of Kurt Metzger, who attributed the underrepresentation to factors *outside* the jury selection process. Kurt Metzger expressly opined at the evidentiary hearing below that the reasons African-Americans do not respond to census inquiries are likely the same as those for not responding to a jury questionnaire. These reasons included Metzger's general assertion that a higher percentage of African-Americans than Caucasians willingly express distrust

for the government and judiciary as well as several more specific economic factors that were disproportionately higher in the African-American community.

Of course, I do not reject the proposition that systemic exclusion may exist, only that defendant has not made the requisite showing on the record produced in this case. We cannot conclude that the underrepresentation was due to systemic exclusion such as that described in *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), simply because the jury-selection systems once contained similarities. In *Hubbard*, *supra* at 480, this Court could conclude that "[t]he evidence produced on remand reveals that the jury allocation process employed by Kalamazoo county before July 1992—and not random selection—caused the underrepresentation." The record in this case does not support the same conclusion.

Accordingly, I would find that the trial court did not clearly err in making its findings of fact on the record below nor did the trial court abuse its discretion in denying defendant's motion for a new trial.

/s/ Joel P. Hoekstra

STATE OF MICHIGAN

IN THE CIRCUIT COURT

FOR THE COUNTY OF KENT

THE PEOPLE OF THE STATE OF MICHIGAN Plaintiff, v DIAPOLIS SMITH, Defendant.	Court of Appeals No. 172558 Circuit File No. 92-60735-FH Hon. Paul J. Sullivan FINDINGS OF FACT & OPINION

Appearances:

Timothy K. McMorrow (P25386)
Chief Appellate Attorney
Kent County Prosecuting Attorney
416 Hall of Justice
Grand Rapids MI 49503
(616) 336-3577

James S. Lawrence (P33664)
Attorney for Defendant Smith
One Kennedy Square - Ste 500
Detroit MI 48226
(313) 965-4189

Corinne Beckwith Yates (P47463)
Attorney for Defendant Palmer on Case 93-63788-FH, consolidated with 92-60735 (Judge Dennis Leiber)
State Appellate Defender Office
340 Business and Trade Center
200 Washington Square, North
Lansing, MI 48913
(313) 256-9833

This case involving Diapolis Smith, and another case (People v. Robert Palmer - 93-63788-FH) were remanded by the Court of Appeals for a hearing concerning the propriety of jury selection procedures in place at the time. Mr. Smith was convicted by a jury selected in September 1993 of second degree murder and felony firearm. He was sentenced to prison for life, plus two years consecutive.

By Order of May 14, 1997, the Court of Appeals remanded both cases to the Kent Circuit Court for a consolidated evidentiary hearing on the claim that defendants were denied an impartial jury. The hearing extended over two days, February 2 and April 27, 1998. Judge Dennis Leiber (Palmer case) and the undersigned Judge Paul Sullivan (Smith case as successor to Judge Michael Smolenski) jointly presided over the hearings. This Opinion deals only with the Smith case. Judge Leiber will be issuing a separate Opinion on the Palmer matter.

While the Smith jury was selected b September 1993 and the Palmer jury in the following term, the procedures and court personnel involved were significantly different. The Smith jury was chosen during the last month of the 1992-93 jury term. Accordingly, the procedures utilized in Smith initially were carried out by former Circuit Court Administrator James Dykema. Current Administrator Kim Foster was in part responsible for the design and implementation of procedures relating to the Palmer case.

The Court has some concern about the reliability of testimony from Mr. Foster as to procedures in effect when jury lists were being compiled for the panel used in Mr. Smith's case. On several occasions he indicated his lack of knowledge or involvement concerning procedures prior to the

October 1993 panel. However, some testimony was elicited concerning his "understanding" of the procedures in use at the time. The People did not object to such testimony and, while also imprecise as to dates and times, testimony of Chief Defender Richard Hillary arguably provided support to the contention that in September 1993 jurors were first assigned to district courts, with circuit court only utilizing those not assigned to district court panels. Accordingly, albeit reluctantly, the Court will accept such "understanding" as factual. Note that starting with the panel first utilized in October 1993, jurors were selected first for circuit court service, and then for the district courts.

Selection of district court jurors from the jury pool prior to selection of circuit jurors arguably could present serious problems. A similar procedure in Kalamazoo County was deemed to be violative of the Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. *People v. Hubbard (after remand),* 217 Mich App 459 (1996). This Court has serious concerns about such a procedure and its potential impact upon the availability of minority jurors for circuit court service. In fact, such concerns likely resulted in the revised procedure which went into effect the following month, and which resulted in jurors first being chosen for circuit rather than district service. Per the 1990 census, the City of Grand Rapids had a population of 189,126, of which 18.5% were black. For the same period, the population of Kent County was 500,631, of which 8.1% were black. (Defense Exhibits A&B). Therefore, defendant has established that the percentage of minority residents is significantly higher in the City of Grand Rapids (61st District Court) than in the rest of Kent County. Thus, if the 61st District Court had need for significantly more jurors than the other district courts in the county, it could properly be

argued that minority representation on circuit jury panels would be adversely affected.

This Court is sympathetic with defendant's position. Depending upon a variety of circumstances, this Court would likely hold in the same or similar way the Kalamazoo Circuit Court held in *Hubbard, supra*. Unfortunately for defendant, however, and despite voluminous evidence having been presented by his learned counsel who obviously has put considerable time and effort into this case, this Court is left to speculate on important facts needed for a reasoned decision in support of defendant's position. We do know from the evidence that there are twelve district judges in Kent County, and that six of them serve in the 61st District Court. We simply do not know whether the number of jurors used in the 61st District Court is greater than, less than, or roughly equal to the pro-rata number used in other district courts in the county. In the absence of substantial pro-rata differences in the number of jurors summoned for out county districts in relation to 61st district, there would be no problem.

Apparently this court is being asked to presume that more jurors are used in the 61st District Court than in other districts. There is little evidentiary basis for such presumption, and this Court must rely upon evidence, not conjecture. Even were this court to improperly assume higher caseloads, more jury trials, more criminal trials, etc. in tile urban 61st District Court, the record is devoid of evidence concerning jury selection procedures in the various districts. All that is known (through hearsay testimony of the current court administrator) is that each district informed the Circuit Court of how many jurors would be needed for that particular district over the coming year. Even were caseloads significantly different, some districts could have used the same jurors for a number of

different trials, while others may have used jurors for one trial only. Similarly, some districts might have employed procedures more likely to encourage guilty pleas or bench trials. Evidence has not been presented as to how many jurors each of the respective districts needed for the period in question, in relation to other districts. Without such evidence, one cannot legitimately conclude the existence of a process that unfairly drained minority jurors from the circuit pool.

Pursuant to *Duren v. Missouri*, 439 US 357 (1975), for defendant to prevail on his 6th Amendment claim of systematic underrepresentation of minorities on Circuit Court juries, he must establish:

> 1. That the excluded group is a "distinctive" group in the community;
>
> 2. That the representation of this group in the venue from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> 3. That this underrepresentation is due to systematic exclusion of the group in the jury selection process.

There is little doubt that African-Americans are a "distinctive" group as envisioned by *Duren*. Defendant has adequately established that his claim involves this distinctive group. Similarly, defendant has established to this Court's satisfaction that there appears to have been an underrepresentation of blacks on the jury. Of 37 prospective jurors examined prior to trial, the record reflects that none were African-A This is highly suspect in view of the population figures set forth above and in Exhibit B. In Kent County, 8.1% of county residents are black. Generally, one would expect that approximately 3 of the 37 prospective

jurors would have been black. The fact that none were is not necessarily dispositive of that issue. In fact, even had it been established that absolutely no African-American jurors were in the array, such would not, standing alone, be sufficient to sustain a challenge to that array. *People v. Flowers,* 222 Mich App 732 (1997). In the instant case, however, the court has been presented with extensive data through defendant's statistician, Dr. Stoline. This data covered not only the panel in question, but other panels during that particular jury term. Frankly, there appears to have been rather consistent underrepresentation.

Having concluded the existence of such underrepresentation, the Court must now address whether same constituted "systematic exclusion." Defendant presented Kurt R. Metzger, Director of the Michigan Metropolitan Information Center at Wayne State University. Mr. Metzger noted historical problems relating to undercounting of minorities at time of census taking. He opined that such undercounts were the result of some factions of the community being more mobile than others. Renters and unmarried individuals move more often than homeowners or married people, and he further testified that Black Americans are more likely than Caucasian Americans to be single, and to be renters. Other observations included that African-American males more often then their white counterparts would be imprisoned or otherwise unqualified to serve as jurors, that for economic reasons they would be more likely to seek amid receive excuses from jury service, and that they would be more likely to lack basic transportation to get to and from the court house for jury service.

The above opinions seem plausible. Nonetheless, they are little more than opinions of possible reasons why statistical evidence seemed to demonstrate

underrepresentation. Sending jurors to "busy" district courts and thereby deleting minorities from circuit jury panels, clearly could be a reason for such underrepresentation. If that had been proven [it was not, in this court's opinion], such would have been a systematic problem unrelated to action or inaction on the part of persons outside the system. Despite this circuit's good faith efforts to devise permissible procedures to lessen the possible effect of such factors (economic, marital status, mobility, etc), the simple fact remains that any perceived shortfall is based upon factors outside the system itself At the very least, defendant has been unable to prove with any reasonable degree of probability why such disparity exists and/or, to the extent it does exist, whether the reason for same is systematic or based upon factors outside the control of the system.

Again, this Court is very sympathetic with defendant's complaints. This Court should not have to decide this important issue based upon mere speculation, however. Unfortunately, this is what it is being asked to do. Speculation is dangerous and totally unreliable. During the hearing, the prosecutor referred to the Circuit Court Jury Selection Process Manual which he suggested both judges could take judicial notice of because both were signatories to it. However, in reviewing People's Exhibit 2, the actual manual, same was approved a few months before the undersigned assumed his position as circuit judge. In other words, it was not signed by this judge. And the Court will take judicial notice of the fact that it had never seen this document until its receipt into evidence at time of the hearing. Similarly, the hearsay testimony about procedures in place at the time the Smith jury was selected, and upon which defendants wish this court to rely, has been shown to be less than reliable. Mr. Foster assumed that individual hardship requests for jury excuses were decided upon by the

Chief Circuit Judge or Court Administrator. When Ms. Orlikowski testified, however, she indicated that at the time relevant to this case, such excuses were considered and decided upon by the jury commissioners. These are not earth shaking discrepancies, nor are they representative of any intention on the part of one side or the other to misrepresent facts. They are merely illustrative of the reason why courts need rely upon something more than speculation when making the kinds of decisions being asked of it today.

For all of the above reasons, this Court holds that defendant Smith has failed to establish the existence of systematic exclusion of African-Americans in the jury selection process in place when he was tried and convicted. If such a problem exist - which this Court unfortunately concedes may have been possible - defendant has failed to satisfy its burden in that regard.

DATED: June 8, 1998

/s/ Paul J. Sullivan
Paul J Sullivan,
Circuit Judge
(P-24139)

PJS/s

Analysis of the Kent County Circuit Court

Jury Selection Process

For the Period: A 1993 — October 1993

by

Dr. Michael R. Stoline
Department of Mathematics and Statistics
Western Michigan University

April 23, 1998

prepared for

Linda Borus — Chief Investigator
Michigan State Appellate Defender Office

Section 1: Executive Summary

This report contain, an analysis of the characteristics of the 929 people selected to serve as Kent County, Michigan Circuit Court jurors during the period: April, 1993 – October, 1993. This list of 929 jurors was compiled from returned questionnaires sent to randomly selected names from the lists provided by the Office of the Michigan Secretary of State. The list of 929 jurors is a pooled list from six district samplings for each of six consecutive four-week periods (labeled terms) in this period.

Statistical analyses were performed comparing composition characteristics of this sample of 929 to those adults with ages in the range: 18-49 in the 112 census tracts summarized in the 1990 U.S. Census of Kent County, Michigan. The 1990 population of people with ages in the range: 18-69 in Kent County was 322,383, which was comprised of 89.86% White residents and 7.28% Black residents.

Two conclusions can be drawn from the statistical analysis described in this report:

(1) a larger than expected proportion of the 112 census tracts in Kent County are biased with either an over-representation or an under-representation of jurors on this list of 929 jurors, and

(2) the biased census tracts containing relatively few Black residents tend to be over-represented on that jury list, and the biased census tracts containing relatively more Black residents tend to be under-represented in the list of 929 jurors.

This analysis supports the overall conclusion that use of this list of 929 jurors could lead to an under-representation of Black residents serving on Kent County Circuit Court juries in this period.

Three summary estimates of the magnitude or the under-representation of Black residents on the jury lists are:

(1) Blacks may be under-represented by about 18% on this jury list of 929,

(2) Blacks may be under-represented in five of the six terms in this period, and

(3) the under-representation of Blacks is estimated to exceed 40% for one of the terms and to exceed 30% for one of the terms.

Specifically, if unbiased random sampling of adults aged: 19 – 69 in Kent County had been employed using the 1990 U.S. Census of Kent County as a frame, one would expect 67.6 = 929* (.0728) Blacks on the jury list. However, only 55.5 Black jurors are expected to have been actually selected to this list using the existing jury selection process.

This is an estimated under-representation of 12.1 Black residents (or 17.9%) from the 67.6 Black residents expected to be on the list if there were no bias in the selection process used.

This estimated under-representation of Black residents is due to the fact that relatively fewer residents were observed to have been selected from those Kent County census tracts containing more Black residents.

Details describing the background of this analysis are provided in Section 2. Statistical analysis details are

given in Section 3. An analysis summary of the estimated over-representation or under-representation bias on a census tract by census tract basis is given in Table 1 or Section 3, and summarized in Section 4. The issue of bias in Black under-representation on the jury list is discussed in Section 5. The estimates of the under-representation of Blacks on a term by term basis are provided in Section 6. Finally, Section 7 contains a brief technical description of the statistical methods used in obtaining the estimates and p-values reported in this document.

Section 2: Introduction

During the fall of 1997, Linda Boris of the Michigan Appellate Defender Office talked with me by phone and asked if I would be able to examine the Kent County Circuit Court jury selection process for the 1993-1994 period Her concern was that few, if any, Black jurors were observed to have been selected or to have served in this period. She asked if I would be able to examine the jury selection process and to specifically ascertain if there existed possible statistical problems with the jury selection process in Kent County in this period with respect to selection of Black jurors.

I expressed interest in examining this process. Ms. Borus then reported that this examination would be needed by early February, 1998.

On December 9, 1997, Linda Borus sent to me a hard disk containing data regarding the composition of the Kent County Circuit Court jury lists for the period: October, 1993 – October, 1994, The data contained the census tract, term selected, and address of 2252 jurors randomly selected by use of lists provided by the Michigan Secretary of State's Office. Eleven separate lists of approximately 200 were provided, each by

random selection, one for each of the eleven four-week terms in this period. The Secretary of State list is basically comprised of Michigan residents either possessing a valid Michigan Driver's License or a Michigan ID, and who also resided in Kent County during this period.

The State Appellate Defender Office also provided a data summary of the 19 Kent County U.S. Census to me. This summary contained Black population, White population, and total population census counts of adults whose ages are in the range: 18 - 69 for each of the 112 census tracts in Kent County, Michigan. This 1990 U.S. Census data is attached to this report as Appendix A.

***

above. This expected under-representation of Black residents is because of the anticipated under-representation of jurors from the census tracts with the largest proportions of Black adult residents.

Table 4 contains an estimate or the expected numbers of Black citizens to have been selected in each or the six jury term list selections. Table 4 also contains a tabulation of the combined total of these six terms. These estimates are calculated based on the observed frequencies of jurors selected from each of the 112 census tracts as contained on the summary of the jury list provided in Table 1. These estimates are also made assuming the ethnicity composition of the questionnaries returned (after being selected from the Michigan Secretary of State's list) is identical to the ethnicity pattern in the 1990 U.S. Census for each of the 112 individual Kent County census tracts for adults.

Table 4: Expected Number of Black Jurors by Term for the period: April, 1993 – October, 1993				
	Expected Number of Blacks (no Bias assumed)	Estimated Actual Expected Number of Blacks (bias assumes	Estimated Difference = (no bias) – (bias)	Estimated Percentage of Over or Under-repre-sentation Of Blacks
7	10.6	7.7	-2.9	27.4% under
8	11.4	12.3	0.9	7.9% over
9	10.9	6.3	-4.6	42.2% under
10	11.2	10.7	-0.5	4.4% under
11	12.0	10.9	-1.1	9.2% under
12	11.5	7.5	-4.0	34.8% under
Combined Total	67.6	55.4	-12.2	18.0% under

Expected Composition of Blacks on the Individual Term Jury lists

From Table 4, it can be seen there is an expected under-representation of Blacks on five of the six term jury lists. Only for Term 8 is there an expected over-representation or Black jurors. For Term 9 the expected under-representation of Blacks exceeds 40%. For Term 12 the expected under-representation exceeds 30%. These two terms present the most severe examples of expected under-representation of Backs on the jury lists.

Expected Composition of Blacks out the combined Jury Lists

From Table 4, it can be seen that 55.4 blacks are estimated to have been selected to the jury list, which is based on the anticipated bias resulting from use of the actual jury selection method. This is an under-representation of nearly 12 Blacks (or 18.0%) from the

67.6 Blacks expected to be on the list if there were no bias in the selection process used.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUN 12 2009
OFFICE OF THE CLERK

(2)

No. 08-1402

IN THE SUPREME COURT
OF THE UNITED STATES

MARY BERGHUIS,

Petitioner

-v-

DIAPOLIS SMITH

Respondent.

ANSWER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES STERLING LAWRENCE (P33664)
Attorney for Respondent Smith
828 W. Eleven Mile Road
Royal Oak, MI 48067
(248) 399-6930

QUESTIONS PRESENTED

This case deals with the unanimous ruling of the Sixth Circuit Court of Appeals that the all-white jury that convicted Respondent in 1993 in Kent County, Michigan, was part of an objected-to, and persistent, pattern of underrepresentation of minorities in that county before 1994, and thus was unconstitutional under the Sixth Amendment and *Duren v. Missouri*, 439 U.S. 357 (1979).

The questions presented by Petitioner are:

QUESTION 1: WHETHER THE SIXTH CIRCUIT RULING CREATES A CONFLICT AMONG THE CIRCUITS.

QUESTION 2: WHETHER THE SIXTH CIRCUIT BASED ITS RULING ON CLEARLY ESTABLISHED LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT.

QUESTION 3: WHETHER THE SIXTH CIRCUIT CORRECTLY FOUND THERE WAS SYSTEMATIC UNDERREPRESENTATION.

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DIAPOLIS SMITH, Respondent, by and through his attorney, James S. Lawrence, moves this Court to deny a Writ of Certiorari to review the unanimous ruling of the Sixth Circuit Court of Appeals panel granting a Petition for Habeas Corpus.

OPINIONS BELOW

Petitioner has properly cited the opinions below.

STATEMENT OF JURISDICTION.

Respondent concedes jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has properly cited U.S. Const., Amend. VI, and 28 U.S.C. § 2254.

INTRODUCTION

This case involves the application of *Duren v. Missouri*, 439 U.S. 357 (1979), prohibiting the systematic underrepresentation of minorities on juries. The trial took place in Kent County (Grand Rapids) Michigan in 1993. Somehow there were no African-Americans available to be on the jury, in a county that is 8.1% black. The showings over a 17 month period, showed underrepresentation of African-Americans 15 out of 17 months, and

underrepresentation of 34% in Respondent Smith's jury month.

The Sixth Circuit ruled this was caused by an improper procedure that Kent County abandoned in late 1993. The ruling is therefore not likely to apply to others. Because the practice we complain of has stopped entirely, we submit it is not an appropriate subject for United States Supreme Court action. Indeed, it appears that not a single person but Smith himself has ever gotten a conviction reversed on the basis of the ruling in this case.

The provisions of *Duren v. Missouri* are almost impossible to enforce for any criminal defendant, because the evidentiary showings required are so burdensome and expensive as to be beyond the reach of almost all defendants. Respondent, and apparently Petitioner, has not been able to find even a single federal court ruling granting such a claim over the last 20 years. When one person manages to squeeze through the eye of this needle by making the requisite showings, Diapolis Smith, that is considered by the State to be intolerable.

The required showings are even more difficult to make in counties like Kent County that refuse to keep records of the race of people called for jury service, and to keep records of the excuses given out. Petitioner seeks to maintain the county's own failure to keep records as a basis to deny relief.

Petitioner's position is that the ruling of *Duren*

is not clear enough to be enforceable. Respondent submits that the constitutional protections upheld in *Duren* may not be so easily dismissed.

Petitioner claims (Pet. 4) that 3 other Petitions for Certiorari filed by them, involving different legal issues than this case, show hostility by the Sixth Circuit against the State of Michigan. In fact, if those other cases show anything, they show a persistent pattern of unreasonable affirmances by Michigan courts. [1]

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[1] See the 3 Sixth Circuit rulings in the cases cited by Petitioner, issued by 8 different judges, each of which appears to be correctly decided: *Avery v. Prelesnik*, 538 F.3d 434 (6th Cir. 2008): "we agree with the district court's conclusion that potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to 'undermine confidence' in the outcome of the jury verdict"; *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008): "where the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, there is insufficient evidence to satisfy the *Jackson* standard"; *Thompson v. Berghuis*, 547 F.3d 572 (6th Cir. 2008): "Rendering the trial 'fundamentally unfair,' however, is not the standard used to evaluate a claim of ineffective assistance; under *Strickland*, the required showing is prejudice, measured as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Not only was this panel ruling unanimous, and coincident with the original ruling of the Michigan Court of Appeals in this case, but not one judge of the Sixth Circuit voted to grant rehearing en banc. The unanimous opinion of the Sixth Circuit that these issues were not worthy of further review is entitled to some respect.

Underrepresentation of minorities on juries is a national problem and national disgrace. This Sixth Circuit ruling will not fix the problem. However, a ruling unfavorable to Respondent will encourage state officials to ignore inadequate representation of minorities on juries, since that defect will not result in federal action. If Respondent with his overwhelming showings cannot win, then no one can win, and the modest progress that this ruling might inspire among court administrators would come to a halt. The rule of *Duren*, that purports to give protections to the public, but in practice almost never protects anyone, shows how far many lower courts have strayed from its teachings.

If the Sixth Circuit erred at all, it was by not finding other bases to grant a new trial.

The trial of Mr. Smith was riddled with errors which did not receive court attention. The case against him is so weak that it is inconceivable that with effective representation and a properly constituted jury he can be convicted. The first ruling granting him reversal took place 10 years ago, yet,

no new trial has taken place. This Court should deny the writ of certiorari and permit the long-delayed fair trial to finally take place.

STATEMENT OF THE CASE

Statement of Proceedings

Respondent accepts Petitioner's factual account of the historical proceedings in this case.

Statement of Facts

Trial Testimony

The charges arose from the shooting of Christopher Rumbley at So So's Bar in Grand Rapids late in the evening on November 6, 1991. The bar was crowded with 200 to 300 people, all black. (T 172, 1008).

Two witnesses out of 36 who testified and who were present during the shooting testified that Respondent Smith was the one who shot Rumbley. Katherine Brown testified that she saw Respondent shoot while Respondent was holding the victim's collar (T 219). The medical examiner, Dr. Cohle, testified the shot was from at least 4 feet away at a downward angle. (T 694-695, 702). Brown didn't identify Smith at the lineup because she "didn't

understand the question" being posed to her by the police at the lineup. (T 226). At the preliminary examination, she testified she did not see Smith with a gun, while at trial she said she saw him shoot with a gun. (T 234; PET I, 12). The police got her to change her story because the existing evidence was not good enough to convict him.

Anthony Hardin testified that he saw Respondent shoot the deceased holding the gun level while right next to him (T 1313, 1346-1347), but admitted that he told police the shooter was shorter than Rumbley, (T 1344-1345). Respondent Smith was 5 inches taller than Rumbley. (T 399, 693)

Chris Rumbley, the deceased, was 5'7 1/2" tall. (T 693). The deceased died from a gunshot wound to the right side of his chest, fired at a downward angle from a range of more than 4 feet. (T 694-695, 702). It was inconsistent with a person firing while grabbing the deceased's collar. (T 711-712).

Two witnesses testified that Respondent was the shooter, and 3 testified they saw Respondent with a gun. One of the 3 was uncertain, while another saw the man for only a second or two. Five witnesses plus Respondent testified they saw the shooting and were certain Respondent was not the shooter. One witness testified Respondent was not one of the men he saw fighting with the deceased.

Laura Dean and Jimmy Mack testified the shot came from a distance. (T 373, 805). Yet, Smith was

convicted because he was seen next to the deceased when the shot was fired.

A man named Rod Fee looked similar to Respondent Smith. (T 206, 1056, 1090). Sandra Buchanan identified Rod Fee as the man she saw arguing with Rumbley shortly before the shooting. (T 516). Eva Price testified Dorothy Brown introduced her to a man at So So's that night who resembled Respondent but was not Respondent. (T 623-624). Dorothy Brown told her the man, named "Raffee" or "Rafael," was "her man." (Dorothy's man). (T 630, 1180-1181).

Evidentiary Hearing Testimony

By the time of final seating of 14 jurors, 23 had been excused, making a total of 37 people who had gotten into the jury box. Every one of these 37 people was white. (T 145, 148). Defense counsel challenged this, but was denied. (T 148).

At the evidentiary hearing, Kent County Circuit Court Administrator Kim Foster testified that notices to prospective jurors were sent out by mail. 5% were returned by the post office as undeliverable. An additional 15 to 20% were not responded to. (EHT I, 17). Of the no-response letters, a second letter is sent out, which gets about a 50% response rate. (EHT I, 18-19).

For those who do not respond, an order to show

cause is mailed out. No action is taken against those who fail to respond to the show cause order. (EHT I, 19-20). It is unknown how many served with show cause orders appeared or failed to appear. (EHT I, 48). Kent County law enforcement would not serve bench warrants, if issued. (EHT I, 48). After this process, the responding potential jurors are placed on the qualified jurors list. (EHT I, 20).

Mr. Foster explained that if a person on the questionnaire claims one of the statutory exemptions, that person is not placed on the qualified jurors list. As for verification of the exemption, "We do some verification, depending on our resources." Beyond checking birthdate and mental disability lists, "we generally take the individual's word." (EHT I, 21).

Neither list contained the race of the individual being kept or being excused. (EHT I, 22).

If a notice to appear to a juror is not delivered, the court takes no action. (EHT I, 25). If a person who gets a notice to appear fails to show up, they make an attempt to contact the person by telephone. If the person does not have a telephone, they "generally" send out a letter, with no action taken if no response. (EHT I, 26-27).

Beginning October 1, 1993, the court began selecting Circuit Court jurors first, then District Court jurors. However, before that date, District Court jurors were selected first, and only then were

Circuit Court jurors selected. (EHT I, 27-31).

Respondent's jury selection began September 13, 1993. The juror list would have been selected in May and June of 1992, approximately 15-16 months before Respondent's trial. (EHT I, 28).

Mr. Foster testified (EHT I, 30):

> "Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just -- it represented certain portions of the county."

Mr. Foster observed "[t]he visible minority jurors appeared low." (EHT I, 38).

Dr. Michael Stoline is professor of mathematics and statistics at Western Michigan University, with a doctorate degree in 1967. (EHT I, 66). Through statistical analysis, he concluded that out of the 2,252 jurors who appeared at court, one would expect to have 164 blacks, but there were only 139 blacks. (EHT I, 77).

Dr. Stoline testified that out of 11 jury terms in his 1993-1994 figures, in 10 out of 11 there was significant underrepresentation of blacks, in two of them more than 40%. (EHT I, 80). On average, that was a 15 % underrepresentation. (EHT I, 102-103).

He found the extent of deviation was larger, and more consistently pointed away from blacks, than could be accounted for by chance. (EHT I, 81-82).

The overall underrepresentation of blacks on juries was 18%, which was higher than the 15% observed in 1993-1994. (EHT II, 9-10). During month 12 of the 1992-1993 year, which ended October 1, 1993 [Mr. Smith's trial month], the underrepresentation of blacks was 34.8%, much higher than the half-year figure of 18% for April thru September, and more than twice as high as the 15.1% underrepresentation for the 1993-1994 year. (EHT II, 11, 15-17).

Richard Hillary of the Kent County Defenders Office testified that "Back prior to 1993, or even halfway through 93 and up to 94, I recall there being very few, if any, minorities, specifically black potential jurors at all." "It had been a consistent problem since I began my practice in 1980." "If I said it in terms of percentages, 98% of the time we had all-white juries." (EHT I, 130). The problem was frequently discussed by local attorneys and by the bench. (EHT I, 130). The court in 1994 began sending out second mailings to those who did not answer the first mailing. Another change was to put stronger language in the letters as to sanctions for not appearing. (EHT I, 133-135). Since those changes were made, "there has been a noticeable increase in the number of minorities that show up." (EHT I, 135).

Mr. Hillary also testified that it was a concern that qualified jurors were first sent to District Court,

then the leftovers would be sent to Circuit Court. In fact, jurors called to District Court, if they did not get on a jury, were not even put back into the pool for Circuit Court. After some months of study, they concluded that this caused too few minority residents to appear on Circuit Court juries. (EHT I, 135-136).

Kurt Metzger of Wayne State University since 1990 was director of the Michigan Metropolitan Information Center, that does demographic and economic research. He had degrees and worked for the census bureau for 15 years. (EHT I, 142-144). He was qualified as an expert in demographics and surveying techniques and the use of census information. (EHT I, 147).

Mr. Metzger testified to statistics showing that blacks had far more single parent households, poverty households, rented, moved in the last 15 months, and had no car, and the effects this had on their appearance on juries. (EHT I, 154-157).

PETITIONER'S CLAIMED REASONS FOR GRANTING THE WRIT

1. CLAIM THAT THE SIXTH CIRCUIT RULING CREATES A CONFLICT AMONG THE CIRCUITS.

A defendant in a criminal trial is entitled to a jury drawn from a venire representative of a fair cross-section of the community from which the case is tried. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). As the Court held in *United States v. Gelb*, 881 F.2d 1155 (2d Cir. 1989):

> "While the equal protection clause of the Fourteenth Amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination ... the Sixth Amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of ... motive."

To establish violation of the right to a jury drawn from a fair cross-section of the community, the defendant must prove: (1) that the excluded group is a "distinctive" group in the community; (2) that the representation of this group in the venire from which juries are selected is not fair and

reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, supra.

Cases cited by Petitioner that fail to follow these rules, or that evade them by clever mathematical tests which depreciate persistent underrepresentation as insignificant, are in conflict with the holdings of the United States Supreme Court.

The use by the Michigan Supreme Court, and in some of the cases cited by Petitioner, of the faulty "absolute disparity" test was unreasonable, because it presumes that wherever blacks are only a small percentage of the population, their underrepresentation on juries is justified because of the small number of people being discriminated against, compared to the population as a whole.

Because of the number of blacks in Kent County, it would be <u>impossible</u> for any Kent County jury selection to ever meet the absolute disparity standard, even if no blacks were ever put on juries for decades. The prosecutor conceded this in his brief to Michigan Supreme Court, p. 15.

Under the absolute disparity test promoted by Petitioner, and rightly rejected by unanimous Sixth Circuit vote, only those defendants in the 5 Michigan counties with black populations higher than 11.2% (Berrien, Lake, Muskegon, Saginaw and Wayne

counties) could ever complain about underrepresentation of minorities on juries, while defendants in the remaining 78 counties would be mathematically barred from complaining.

In the instant case, jurors were siphoned from the jury pool to appear on the local city juries (District Court), and if not selected for District Court service, were excused, without being returned to the jury pool. The large volume of cases in the city of Grand Rapids compared to the whole county, and the large number of minorities in the city of Grand Rapids compared to the rest of the county, caused this system of manipulation of the jury lists to directly result in substantial underrepresentation of minorities in the Circuit Court jury pools, month after month after month. The Michigan courts recognized this in *People v. Hubbard*, 217 Mich. App. 459 (1996), but were to abandon that recognition in this case.

Respondent has never claimed it is wrong to use voting lists as a basis from which to call prospective jurors. However, after using those voter lists, Kent County removed substantial numbers of minorities from the available pool by using nonrandom criteria that make this case very different from the challenges that have failed for other defendants.

The cases cited by Petitioner are readily distinguishable from this case. In *United States v. Royal*, 174 F.3d 1 (1st Cir. 1999), there was no

siphoning. When jurors had excuses, these were temporary, and the jurors were resummoned later, unlike this case where jurors once removed stayed removed. In *Royal*, only 10 of the excuses were unrecorded, unlike this case where none of the excuses was recorded.

Most importantly, the Court, in speaking of an earlier case on which it relied, stated: "The court recognized that the absolute disparity in the case would be small 'even if every black in the region were excluded from jury service.'" Yet, they use that test anyway. They also recognized that that result could only be accomplished by overruling *LaRoche v. Perrin*, 718 F.2d 500 (1st Cir. 1983).

In *United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996), the Court followed the absolute disparity test, but had to overrule *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995) in order to do it. Moreover, in *Rioux*, unlike this case, the Court was not dealing with the siphoning and other nonrandom elements that removed minorities from the jury pool in this case. Also, the Court in *Rioux* held that "it remains unclear whether statistics alone can prove systematic exclusion," brushing off that that was the very approach applied by the Supreme Court in *Duren*.

The mere fact that some courts have strayed from the *Duren* ruling (even though they had to overrule their own precedent to do it) is no basis for

overturning the Sixth Circuit ruling in this case which was true to the principles of *Duren*.

Petitioner cites *United States v. Weaver*, 267 F.3d 231 (3rd Cir. 2001), but that case did not use absolute disparity alone, examining the issue using both absolute and comparative disparity. Thus, Petitioner mischaracterizes the case. Moreover, *Weaver* involved a challenge to the use of voter lists to choose prospective jurors, which is nothing like the challenge Respondent prevailed upon here. The Court stated that "where substantial representation is traceable solely to the exclusive reliance on voter registration lists" the defendant could not prevail, a very different situation from this case.

Petitioner ignores the 4th Circuit, which in *United States v. Lewis*, 10 F.3d 1086 (4th Cir. 1993) uses the comparative disparity test, though they do not use that label. Therefore, it is not true that the instant case "establishes" a conflict among the circuits: the conflict was already there.

Petitioner cites *United States v. Butler*, 611 F.2d 1066 (5th Cir. 1980). However, that case based its result on the flawed, and essentially overruled, case of *Swain v. Alabama*, 380 U.S. 202 (1965), which disgracefully denied relief even though "no Negro has actually served on a petit jury since about 1950." [2]

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[2] *Swain* requires "purposeful or deliberate denial to Negroes on account of race of participation as jurors"

Significantly, Respondent has not found and Petitioner has not cited any 5th Circuit case from the last 25 years employing the standard of *Butler*.

Petitioner then cites *United States v. Ashley*, 54 F.3d 311 (7th Cir. 1995), an outrageous decision that highlights the problem with Petitioner's approach. In that case, where the population was 3% black, but none appeared on juries, that was held to be only a 3% shortfall (rather than 100%), and thus not constitutionally significant.

Moreover, in *Ashley*, the Court held: "they have not shown that this discrepancy amounts to anything more than a statistical coincidence." In this case, the underrepresentation happened month after month, and amounted to 34% in Respondent Smith's jury month. If this is just coincidence, why does it keep happening? At the evidentiary hearing Dr. Michael Stoline testified, without contradiction, that the persistent underrepresentation went beyond that which could be caused by simple chance. (EHT I, 81-82). Respondent Smith made the showings that the defendant in *Ashley* did not.

Petitioner then cites *United States v. Rogers*, 73 F.3d 774 (8th Cir. 1996), where the panel felt obligated to affirm because of prior case law of the

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to make a claim, a very different standard than that announced in *Duren*.

circuit, but felt the prior case law was wrong and in direct violation of the ruling in *Duren*. [3] Apart from the believed-required adherence to a prior ruling of the Circuit, instead of adhering to Supreme Court authority, the opinion in *Rogers* strongly supports the correctness of the Sixth Circuit ruling in this case.

Petitioner cites *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989). While this case does endorse the absolute disparity test, it is about as bad as *United States v. Ashley*, supra. The case finds that since there are not many Hispanics in Idaho, it does not matter that there is underrepresentation on jury venires, because the absolute disparity is always going to be less than 10% because the Hispanic population is less than 10%.

Petitioner then cites *United States v. Orange*, 447 F.3d 792 (10th Cir. 2006), but mischaracterizes the case by ignoring its statement that "In order to make this determination, we have consistently relied upon two measurements: absolute and comparative

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[3] It is a peculiarity and disgrace of the federal court system that the principle requiring a panel to adhere to previous decisions of the same circuit is scrupulously honored when doing so denies relief to an individual, *United States v Rogers*, supra, yet, the principle is readily abandoned when needed to avoid denying relief to the government. See *United States v. Royal*, supra; *United States v. Rioux*, supra.

disparity."

Petitioner further mischaracterizes the 10th Circuit holdings by ignoring *United States v. Shinault*, 147 F.3d 1266 (10th Cir. 1998):

> "Indeed, small absolute disparity figures are less persuasive in a case such as this, where, because of the minorities' small population, even the complete exclusion of the groups would result in absolute disparities of less than 6%. See *United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) (noting the weakness of absolute disparity analysis when dealing with small population)."

Petitioner then cites *United States v. Carmichael*, 560 F.3d ___ (11th Cir. 2009), and does correctly characterize the case, which holds:

> "Under black letter Eleventh Circuit precedent, "[i]f the absolute disparity between these two percentages is ten percent or less, the second element is not satisfied[,]" [4]

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[4] This is not reasoning, but the bald application of "black letter law," that is, deference to past decisions of the circuit whether right or wrong, but only when that deference favors the government. The ruling does not conform to *Duren* and enshrines systematic underrepresentation of minorities as legitimate.

This holding reveals the nub of the problem. It provides that in most jurisdictions of the United States, the rule of *Duren* cannot apply, because the minority population is too small to be worthy of constitutional protection. Petitioner wants minorities to be disenfranchised from jury participation like the Hispanics of Idaho were in *Sanchez-Lopez* and the African-Americans of southern Illinois were in *Ashley*.

Petitioner claims that denying certiorari will mean that a person's rights will depend on where one lives. (Pet. 19). This ignores the fact that the rule Petitioner wants enshrined as law would do exactly that, by making the public's access to the right of juries that fairly represent the community as dependent on whether the minority population of the jurisdiction is large enough. If the minority figure is less than 10%, under Petitioner's proposed rule, the defendant loses before he even starts. In those places, the Sixth Amendment right would not exist at all, if Petitioner gets its way.

Petitioner ignores that places where minority population is somewhat small are the very places where that population is most in need of protection. What good is a rule that allows defendants to complain in Detroit, where minorities have political power and thus no need to complain, but withholds the right to complain in Lansing, Jackson, and Grand Rapids?

Petitioner attempts to portray the instant ruling as a rogue ruling that stands alone, but the reality of the case law is far more complex. The key question is does the instant ruling uphold the letter and the spirit of *Duren*, and since it clearly does, there is no real basis for granting certiorari.

2. CLAIM THAT THERE IS NO CLEARLY ESTABLISHED LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT.

In *Duren*, the Supreme Court announced as the second prong of the test: "that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." This standard is no less clear than many standards announced by the Supreme Court.

Petitioner's claim that the Court in *Duren* established the absolute disparity test as the law of the land (Pet. 20) is absolutely false. Petitioner does not quote from any passage of *Duren* that makes such a holding. The word "absolute" does not appear in *Duren* at all, and the test Petitioner claims as controlling was not used. The *Duren* court said:

> "Petitioner established that according to the 1970 census, 54% of the adult inhabitants of Jackson County were

> women. He also showed that for the periods June-October 1975 and January-March 1976 11,197 persons were summoned and that 2,992 of these or 26.7%, were women. Of those summoned, 741 women and 4,378 men appeared for service. Thus, 14.5% (741 of 5,119) of the persons on the postsummons weekly venires during the period in which petitioner's jury was chosen were female. In March 1976, when petitioner's trial began, 15.5% of those on the weekly venires were women (110 of 707). Petitioner's jury was selected from a 53-person panel on which there were 5 women; all 12 jurors chosen were men. None of the foregoing statistical evidence was disputed.
>
> ... The second prong of the prima facie case was established by petitioner's statistical presentation...Petitioner's presentation was clearly adequate prima facie evidence of population characteristics for the purpose of making a fair-cross-section violation."

Duren did not establish any particular means of mathematical analysis, and simply observed that the showing in that case was adequate. The standard established in *Duren* is whether "the representation of this group in venires from which juries are selected is [...] fair and reasonable in relation to the number of such persons in the community." That is the test the Sixth Circuit used in this case, and is the

test that should continue to be used.

Because the precedent of *Duren* exists, this case is nothing like Petitioner's cited case of *Wright v. Van Patten*, 128 S.Ct. 743 (2008). In *Wright*, there had been no Supreme Court authority holding that counsel's participation by speaker phone constituted a constitutional violation. In this case, *Duren* holds that the minority presence on juries must be "fair and reasonable in relation to the number of such persons in the community."

Petitioner's argument is essentially that because *Duren* did not state a specific method of mathematical analysis to be used, no challenge under *Duren* can ever be made. That approach would render *Duren* a dead letter. It was the duty of the Sixth Circuit to apply *Duren*, not to implicitly overrule it as some circuits have done.

While Petitioner claims the instant ruling is a novel one, Petitioner fails to mention or address *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir. 1992):

> "if a disparity is sufficiently large over a significant period of time, then it is unlikely that the disparity is due solely to chance or to accident, and in the absence of evidence to the contrary, a court should conclude that racial or other class-related factors entered into the selection process."

Indeed, the principle has been around much

longer than *Duren*. In *Norris v. Alabama*, 294 U.S. 587 (1935), the Court found underrepresentation where the African-American population was only 7.2% of the population. Under Petitioner's rule, since less than 10% of the population was excluded, *Norris v. Alabama* would have to be considered wrongly decided.

When the Court in *Norris* stated that there was "total exclusion from juries," 294 U.S. at 599, the Court was using the comparative disparity test. The Supreme Court said there was a total, i.e. 100%, shortfall, which is a comparative disparity analysis. The Supreme Court did not say there was a 7.2% shortfall, which would be an absolute disparity analysis.

This panel based its ruling on clearly established law announced by the Supreme Court, primarily *Duren v. Missouri*, prohibiting the systematic underrepresentation of minorities on juries. Petitioner's argument on this point is frivolous.

3. CLAIM THAT THERE WAS NO SYSTEMATIC UNDERREPRESENTATION.

U.S. Census Bureau figures show that as of 1990, Kent County was 8.1% African-American. One would expect to find approximately 1 black person

out of every 12, if the selection procedure were fair. Here, 37 people got into the jury box, without any of them being black. Even if only 2.7% of the county were black, we would expect to see at least 1 black person out of the 37 venirepersons. With 8.1% being black, we would expect to see 3 out of 37. Instead, we saw zero.

There are over 40,000 black people residing in Kent County. Black people by the thousands have been denied the equal right to serve on a jury, and black defendants have been denied the equal right to have persons of their own race have a fair chance to sit on their juries.

The Sixth Circuit ruling is based on the Kent County practice, since discontinued, of calling jurors first to District Court, and only the remaining persons were eligible for Circuit Court service. Grand Rapids had its own District Court, with a high volume of cases as any urban area would have, and with a high proportion of minorities. Even if a prospective juror was not used in the District Court, the system took him or her out of the Circuit Court pool anyway. This stacked the Circuit Court pool with out-county residents, who were predominantly white.

An evidentiary hearing was held. Judge Sullivan found that blacks were a distinctive group in the community, and that there was underrepresentation of that group among persons

called for jury service. We agree. He ruled, however, there was no showing that the underrepresentation was "systematic." We find that ruling to be unreasonable, as did the Sixth Circuit.

One way of determining whether a particular problem is systematic, or simply the result of chance, is whether it keeps happening. Of the 17 jury months for which we have figures, April 1993 to August 1994, in 15 of those months there was underrepresentation of African-Americans among those called to be jurors in Kent County Circuit Court. (EHT II, 50, 75). This is a consistent pattern stretching over a 17 month period. By showing it happens repeatedly, one necessarily shows it is systematic.

If the underrepresentation were not caused by the method of selecting those to appear for jury service, the only remaining possibility is chance. Dr. Stoline testified, without contradiction, the persistent underrepresentation went beyond what could be caused by simple chance. (EHT I, 81-82).

In *People v. VanderVliet*, 444 Mich. 52 (1993), the Court accepted this kind of statistical analysis to demonstrate facts, stating in footnote 35, "The man who wins the lottery once is envied; the one who wins it twice is investigated." To analogize, the Kent County Circuit Court played the lottery 17 times, with chance making it just as likely that blacks would be overrepresented as underrepresented. The

lottery came up with blacks underrepresented 15 times. We would not tolerate such results even from a roulette wheel; we cannot deem them acceptable coming from a court system.

"Systematic" means the result is produced by the method or "system" used to select from the population at large the small number who appear in jury pools. If not produced by chance, the results are necessarily produced by the system. Other than chance, and the system, nothing more remains.

Richard Hillary of the Kent County Public Defender's Office testified that "Back prior to 1993, or even halfway through 93 and up to 94, I recall there being very few, if any, minorities, specifically black potential jurors at all." "It had been a consistent problem since I began my practice in 1980." "If I said it in terms of percentages, 98% of the time we had all-white juries." (EHT I, 130). Evidence at the hearing also showed that the circuit judges had long been aware of the problem. (EHT I 131-133).

The statistics alone are sufficient to show systematic underrepresentation. The observations of Mr. Hillary, alone, and Mr. Foster, alone, are sufficient to show systematic underrepresentation. This would be so even if we had no evidence showing why the system produced these results. But, we do have such evidence.

Court Administrator Foster testified minimal

efforts were made to follow up when mail proved undeliverable, and when, though delivered, it was not answered. When people on the jury list did not show up for court, the efforts were again minimal to get any of those people in. There was a 25% rate of people who either did not get the mailing, or who got it and did not respond. Kent County law enforcement, which is obviously part of the system, will not so much as serve a bench warrant for failure to appear as a juror.

Mr. Foster explained that people could get off jury duty without ever seeing a judge, just by claiming an excuse, such as no ride, no babysitter, etc. Mr. Metzger explained the black population was far more likely to have no ride or no babysitter, based on statistics showing blacks had far more single parents, far more poverty, far more renters, far more people moving, far fewer cars, and far fewer phones. That is before we even get to the attitude of distrust of government which is far more prevalent among blacks than whites, according to the uncontradicted testimony. [5]

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[5] We cannot help but note that the problem of minority distrust of government will certainly not be alleviated by rulings holding that all-white juries in a county that is not all-white violates no rule of law, even when it happens month after month. As Mr. Hillary noted, for years in Kent County there were plenty of blacks available to sit in the defendant's

If someone is a single parent, that person is more likely to need a babysitter. If someone has no car, that person is more likely to need a ride. If a person moves, that person is less likely to appear on the jury panel. If a person has no phone, that person is less likely to receive a call from the court administrator.

As Mr. Metzger testified, the introduction of excuses into the system introduces a non-random element, one that tends toward underrepresentation of blacks. That the excuses are handled without any record kept increases the arbitrariness.

If changes in the system can cure the problem, that identifies the system as where the problem lies. The testimony at the evidentiary hearing showed that once the practice of the "District Court draft" was stopped, in 1994, the problem of all-white Circuit Court juries disappeared.

Similar problems exist with the "no ex-felons on jury" rule. [6] Statistics show that blacks are over 8

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chair, but to see one in the juror's chair was a remarkably rare occurrence. (EHT I, 134-137). In Respondent Smith's trial, 37 people got in the jury box, all white, while 37 civilian witnesses testified, all black. Surely, the racial makeup of the jury did not escape the 37 witnesses.

[6] The legislature, until 2003, did not exempt ex-felons from serving on juries. It exempted only persons presently under a felony sentence. M.C.L.

times as likely to be under sentence for felony than whites. [7] A no felon and no ex-felon rule guarantees a much whiter jury, unless remedial steps are taken.

In the case of Mr. Smith, his month showed underrepresentation of blacks over twice the already-excessive level of underrepresentation for the entire 17 month period.

We also have the fact that Smith's jury was selected in the last month of the jury year. As counsel argued to the court (EHT II. 52-53):

> "We have also the fact that these lists are made a year in advance. Therefore, as you start to get towards the end of the year, such as September of 93, where Mr. Smith's case lies, what you find is that if the people have moved away during that year, or moved to another place within the county, then they are not going to be found and they are not going to appear in the jury box."

Kent County persistently had severe underrepresentation of blacks on juries, yet

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600.1307a. However, the Michigan Supreme Court, had in place a provision disqualifying all ex-felons from serving. M.C.R. 2.511(D)(4). This court rule, was part of the system that led to no opportunity to have blacks on Respondent Smith's jury.

[7] Blacks are 13% of the state population, but 58% of the prison inmates.

Petitioner claims that the system had nothing to do with it. We submit it is the duty of the system to take steps to cure this consistent pattern of underrepresentation. Defendants in Kent County should not have to wait until blacks gain economic parity with whites in order to get judicial parity with whites.

The Michigan Supreme Court decision is brimming with unreasonable rulings. For example, the Court ruled that Respondent Smith must be able to trace the exact mechanism by which the Kent County courts routinely and systematically had underrepresentation of blacks on juries, even though the county kept no records of what they were doing.

Where the county government chooses not to keep records that a litigant might use to show the reasons for the underrepresentation, it is absurd and unreasonable to require Respondent Smith to show what the records would have shown if the government had kept them. It denies due process to allow the government to insulate its decisions from court review by the expedient of not keeping records of what they do.

The 3 factors announced by the United States Supreme Court in *Duren*, supra, do not include requiring the defendant to show WHY there was systematic underrepresentation, only that the defendant show that that there WAS systematic underrepresentation. To require this would allow

the very officials responsible for not keeping records to maintain any illegal practices they want, while the lack of records would prevent anyone from complaining about it. By requiring showings above and beyond those required by the clearly established law of the United States Supreme Court, the Michigan Supreme Court acted unreasonably and in defiance of the standards employed by the United States Supreme Court.

Another unreasonable ruling by the Michigan Supreme Court was their adoption of an unreasonable definition of "systematic." While they gave lip-service to following the ruling of *Duren* (holding that systematic means "inherent in the particular jury-selection process utilized") in fact they ruled precisely the opposite of *Duren*. The United States Supreme Court ruled:

> "His undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic - that is, inherent in the particular jury-selection process utilized."

Here, Respondent showed that there was a discrepancy for 15 out of 17 months, not just occasionally. In the half year of April through

September, underrepresentation was 18%, while underrepresentation for the 1993-1994 year was 15.1%. Underrepresentation for September 1993, when Respondent's trial was held, was 34.8%. It was unreasonable to hold these shortfalls statistically insignificant. It might have been reasonable to hold such figures insignificant if they had been a one-shot aberration, and not been part of a persistent and consistent trend of underrepresentation. But, it kept happening again and again. According to the Michigan Supreme Court, persistent underrepresentation means nothing.

Repeated results are systematic even when not done the majority of the time. See *National Railroad Passenger Corporation v. Morgan*, 535 U.S. 101 (2002) [one proves something to be systematic when it is shown to be "serial or systemic"]; *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) [corporation systematically advertised in state where it did so 3 times in 12 months]; 17 U.S.C. Section 602(a) [copying of copyrighted material can be deemed systematic even if it happens only 6 times]; *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F,3d 883 (6th Cir. 2002) [contacts were "systematic" where they were "something more than random, fortuitous, or attenuated"]; *Jane Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) [6 instances of sexual abuse over 20 months (approximately once in 100 days) constituted "systematic" sexual abuse]. One would

think that 15 out of 17, far more than a simple majority, would qualify as systematic, but to the Michigan Supreme Court, it is merely random coincidence.

It is true that in the *Duren* case the state of Missouri had a specific rule that allowed exemptions to women. In this case, the rules that were being applied were hidden rules. No records were kept. No rules were published about requests to be taken off jury service. No rules were published about people who did not receive jury summons, or people who ignored them.

Another error of the Michigan Supreme Court was the reliance on the absolute disparity test, discussed above.

Yet another unreasonable action by the Michigan Supreme Court was committed in their failure to heed the ruling of *Duren* that the State bears the burden of justifying the failure to attain a fair cross-section of the community.

Because Respondent Smith made several showings about factors that caused the underrepresentation, and was unable to point to any single "smoking gun," he lost. We submit that was highly unreasonable. Constitutionally, Respondent was not required to show why the Kent County Circuit Court persistently and systematically had underrepresentation of blacks on juries. Constitutionally, the prosecution had the duty of

showing why such underrepresentation was necessary to meet "significant state interests." The Michigan Supreme Court wrongly and unreasonably failed to require such showings from the prosecution.

Even the Circuit Judge found that "defendant has established to this Court's satisfaction that there appears to have been an underrepresentation of blacks on the jury...Frankly, there appears to have been rather consistent underrepresentation." (Circuit Court Opinion, June 8, 1998).

Rather than following the Supreme Court in *Duren*, the Michigan Supreme Court ruling took direction from the dissent in *Duren*, which finds that systematic underrepresentation of women is not the same as exclusion of women. The majority in *Duren* expressly finds such analysis to be improper.

The question was whether the underrepresentation was by chance or was systemic. The expert testimony, uncontradicted and accepted as fact, demonstrated that it was not by chance. (EHT I, 81-82, EHT II, 15-17, 50, 75). To conclude as the Michigan Supreme Court did that the underrepresentation was not systemic is patently unreasonable.

In *Duren v. Missouri*, part of the system was a practice that women could get excused simply by asking, which resulted in fewer women on juries, which was held to be unconstitutional. In this case, part of the system was a practice that people without

cars, without rides, or without babysitters could get excused simply by asking, which resulted in fewer blacks on juries.

The Michigan Supreme Court's central premise was that since there was no showing that officials in Kent County intended to have underrepresentation of African-Americans on juries, the demonstrated underrepresentation that did exist is not "systematic." However, in *Duren v. Missouri*, the United States Supreme Court ruled that a showing of systematic underrepresentation does not depend on a showing of wrongful intent by officials.

In *Duren v. Missouri*, the Court used a statistical analysis similar to that used by Dr. Stoline to conclude that underrepresentation of women was systematic:

> "The first sign of a systematic discrepancy is at the next stage--the construction of the jury wheel from which persons are randomly summoned for service. Less than 30% of those summoned were female, demonstrating that a substantially larger number of women answering the questionnaire claimed either ineligibility or exemption from jury service. Moreover, at the summons stage women were not only given another opportunity to claim exemption, but also were presumed to have claimed exemption when they did not respond to the summons. Thus, the

> percentage of women at the final, venire, stage (14.5%) was much lower than the percentage of women who were summoned for service (26.7%).
>
> The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which juries were selected. Petitioner demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria--whether the automatic exemption for women or other statutory exemptions--as implemented in Jackson County. Women were therefore systematically underrepresented within the meaning of *Taylor*."

Here, as in *Duren*, the system as implemented in Kent County at the time of Respondent's trial resulted in persistent underrepresentation of African-Americans, and therefore systematic underrepresentation.

In *Duren v. Missouri*, supra, the Court defined systematic as "systematic--that is, inherent in the particular jury-selection process utilized." It is inherent that when you start with a fair list, then take out lots of urban residents before passing the list on to the Circuit Court, that you are going to get fewer of the urban minority residents. It is inherent

that when you use only mail to reach people, that when you do not follow up adequately with no-responses and no-shows, when you automatically exclude a group where minorities outnumber majorities (ex-felons), when you give out excuses to anyone who asks, when the excuses favor the exclusion of minorities (such as excuses for no car, no ride, no babysitter, etc.), and when the failure to follow up favors the exclusion of minorities (as testified to by witness Metzger) the underrepresentation of blacks is inherent in the particular jury selection process used.

This case is indistinguishable from *People v. Hubbard,* supra, as to the jury matter. The only differences between this case and *People v. Hubbard* are that in this case the record identified many additional reasons inherent in Kent County's system that would also contribute to the underrepresentation of minorities that in fact did occur, that Dr. Stoline found, that Judge Sullivan found, and that the Court of Appeals found.

The system used in Kent County gave these results. A different system would give different results. The underrepresentation is necessarily systematic where it is a result of the system used.

The diversion of jurors to District Court juries was part of the system. The excusal of those designated for District Court jury service who did not actually serve, without putting them back in the pool

for Circuit Court, was part of the system. The refusal of deputies to serve warrants for failure of jurors to appear was part of the system. The exclusion of ex-felons was part of the system. The excusing of people who claimed a lack of a car was part of the system. The excusing of people who claimed need for a babysitter was part of the system. The failure to require proof of excuse was part of the system. The reliance on mail was part of the system. The failure to follow up on nonresponses was part of the system. The irregular nature of the follow-ups that did take place (there was some follow-up in some cases, sometimes by phone, but no record was kept of the follow-ups or how the candidates for follow-up were selected) was part of the system. The failure to follow up on no-shows was part of the system. The use of a jury list using residences at least 15 months old (in the case of Respondent, in the last month of the jury year) was part of the system. The arbitrary excusals by court employees rather than a board, without any guidance, and without any record of what took place, was part of the system.

Under the reasoning of the Michigan Supreme Court, if jurors are notified to appear only by e-mail, and if blacks have less e-mail access than whites, this would prove nothing, because, 463 Mich. at 206, "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." Such analysis

would ignore the (hypothetical) decision of the Circuit Court employees to depend on e-mail where blacks have less of it. The reason for under-representation of blacks on Kent County juries is NOT that blacks have fewer cars or fewer phones or more single-parent families. The reason for the underrepresentation is that the system adopted by Kent County is such that those factors make a difference.

The police made a decision not to serve warrants upon nonappearing jurors, which just happens to coincide with their institutional interest in having more defendants convicted. It was unreasonable for the Michigan Supreme Court to find that the police decisions were not a systematic factor that made a difference to the number of blacks appearing on Kent County juries.

Respondent had an all white jury in a county that is far from all white. The underrepresentation in Respondent Smith's jury year was 18%. The underrepresentation in Respondent's jury month was 34%. The underrepresentation on Respondent Smith's jury was 100%. The Michigan Supreme Court acted unreasonably by finding that Respondent Smith's jury was drawn from a fair cross-section of the community.

The real question is how important do judges feel is the need for representative jury arrays enshrined in the constitution. If judges feel that it is

important, they will want to take steps to see that the individuals responsible for the jury selection decisions will work to root out this problem. Some of those people are the police, who refuse to serve orders to appear to people who do not show for jury duty. If all-white juries are felt to be desirable by elements in the police community because they are felt to lead to a higher rate of conviction, then the police have little incentive to change their policies, if no defendant can get a remedy. If Mr. Smith, with this strong a case, cannot get a reversal, the police certainly need not fear any other reversals, and the modest efforts at administrative reform will stop or even regress.

The prosecutor indicated in state court that if there is underrepresentation, "corrective efforts" should be taken, but no new trials should be given. (P. Br. to Michigan Supreme Court, 24). This analysis wrongly assumes that the identity of who is on the jury has nothing to do with the fairness of the trial. In reality, this is a structural error "which def[ies] analysis by 'harmless-error' standards." *Brecht v. Abrahamson*, 507 U.S. 619 (1993). It is reasonable to conclude (but not required for relief) that a racially-mixed jury will give fairer, more accurate results than juries where the system continually dredges up nothing but white jurors, time after time.

The right to a jury from a fair cross-section of

the community is a constitutional right. It should be given out freely, not doled out in drips and drabs to the one person in 100,000 fortunate enough to be able to commission studies. Certainly, if Mr. Smith, the one person in 100,000 who did make it this far, cannot win on this strong a record, no defendant can ever win. What would that say about the commitment of the court system to fair minority representation on juries?

This was not an open-and-shut case. There were many reasons to disbelieve the 2 people who identified Respondent, who were both directly contradicted by the medical examiner. There were several witnesses certain it was not Respondent. Yet, Mr. Smith is African-American, large and muscular, and the all-white jury who condemned him would be far more likely to react fearfully to him than would a racially-mixed jury. A differently-composed jury might well have reached a different verdict.

The fact that the case against Mr. Smith is questionable, and that he is very likely to win on retrial, especially if the jury is properly constituted, makes this case even more appropriate for the remedy. Largely-black juries in Detroit convict black defendants of crimes every day. If the prosecutor's case against Mr. Smith is strong enough, it will be strong enough even if one or more black citizens make it onto the jury.

CONCLUSION

This Court should deny the writ of Certiorari.

Respectfully submitted,

JAMES S. LAWRENCE P33664
Attorney for Respondent Smith
828 W. Eleven Mile Road
Royal Oak, MI 48067
(248) 399-6930
Dated: June 8, 2009

REPLY BRIEF

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In the Supreme Court of the United States

MARY BERGHUIS, WARDEN,
Petitioner,

v.

DIAPOLIS SMITH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Attorneys for Petitioner

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REPLY BRIEF OF PETITIONERS

The Brief in Opposition only confirms the jurisprudential significance of this case by underscoring the legal points that there is a conflict among the circuits – and no clearly established Supreme Court precedent – on the central issue presented.

Respondent asserts that the decision of the Sixth Circuit here "is not likely to apply" to other cases because the process used by Kent County, Michigan was discontinued in 1993. Brief in Opposition, p 2. But this claim is wrong.

The Sixth Circuit adopted the comparative disparity standard for determining whether a defendant has established a prima facie violation of a defendant's right to have a jury drawn from the fair cross section of the community under the Sixth Amendment. This test will apply to all such claims that arise in the four States within the Sixth Circuit. In Michigan alone, there are currently two pending federal district court cases in the Eastern District of Michigan, *Ambrose v. Booker*, No. 1:06-cv-13361, and *Parks v. Warren*, No. 2:05-cv-10036, in which this issue has been raised.

There is no basis on which to believe that this case will not have a wide application to the jurisdictions throughout Michigan, Ohio, Kentucky, and Tennessee. There is nothing that limits the application of this case to only the facts that gave rise to the standards that the Sixth Circuit established here.

Otherwise, the points in the Brief in Opposition only highlight the need for this Court to grant certiorari because (1) there is a clear split in the circuits on the issue; and (2) the standard applied by the Sixth Circuit was not "clearly established" under 28 U.S.C. § 2254(d) of

the Antiterrorism and Effective Death Penalty Act (AEDPA).

Finally, with regard to the third argument raised in the petition for certiorari, the analysis of the Brief in Opposition only underscores the erroneous nature of the Sixth Circuit's decision on its merits. The Brief in Opposition cites numerous neutral methods of excusing prospective jurors, see pp 39-40, that it claims may result in an underrepresentation of distinct groups under the Sixth Amendment. But the methods employed here by Kent County, Michigan were reasonable, did not result in significant underrepresentation, and did not systematically exclude African Americans.

1. **The Brief in Opposition candidly acknowledges that there is a conflict among the circuits on the proper standard at issue here.**

The first argument in support of the State's petition for certiorari is that the Sixth Circuit decision created a conflict among the circuits. This argument was based on the point that nine of the circuits (First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh) have examined substantially the same fact patterns as alleged here under the three-pronged test of *Duren v. Missouri* that their Sixth Amendment right to have a jury drawn from a cross section was violated, and the circuits rejected these claims.[1] See *United States v. Royal* and *United States v. Hafen* (First Circuit);[2] *United States v. Rioux* and *United States v. Jenkins* (Second Circuit);[3] *United States*

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[1] *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

[2] *United States v. Royal*, 174 F.3d 1, 10 (1st Cir. 1999); *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984).

[3] *United States v. Rioux*, 97 F.3d 651, 655 (2d Cir. 1996); *United States v. Jenkins*, 496 F.2d 57, 65-66 (2d Cir. 1974).

v. Weaver (Third Circuit);[4] *United States v. Butler* (Fifth Circuit);[5] *United States v. Ashley* (Seventh Circuit);[6] *United States v. Rogers* and *United States v. Clifford* (Eighth Circuit);[7] *United States v. Sanchez-Lopez* (Ninth Circuit);[8] *United States v. Orange* (Tenth Circuit);[9] and *United States v. Carmichael* and *United States v. Clarke* (Eleventh Circuit).[10] In four of the circuits (First, Second, Eighth, and Ninth), the courts criticized the comparative disparity test in reaching their decisions.[11]

The Brief in Opposition frankly acknowledges that there is a conflict among the circuits. It cites a decision from the Fourth Circuit Court of Appeals, *United States v. Lewis*,[12] arguing that the Fourth Circuit applied the

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[4] *United States v. Weaver*, 267 F.3d 231, 241 (3d Cir. 2001).

[5] *United States v. Butler*, 611 F.2d 1066, 1070 (5th Cir. 1980).

[6] *United States v. Ashley*, 54 F.3d 311, 314 (7th Cir. 1995).

[7] *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981).

[8] *United States v. Sanchez-Lopez*, 879 F.2d 541, 548-549 (9th Cir. 1989). See also *Thomas v. Borg*, 159 F.3d 1147, 1150 (9th Cir. 1998).

[9] *United States v. Orange*, 447 F.3d 792, 798-799 (10th Cir. 2006).

[10] *United States v. Carmichael*, 560 F.3d 1270, ___ *22 (11th Cir. 2009); *United States v. Clarke*, 562 F.3d 1158 (11th Cir. 2009).

[11] *Hafen*, 726 F.2d at 24 (1st Cir.); *Jenkins*, 496 F.2d at 65 (2d Cir.); *Clifford*, 640 F.2d at 155 (8th Cir.); and *Sanchez-Lopez*, 879 F.2d at 547-548 (9th Cir.).

[12] *United States v. Lewis*, 10 F.3d 1086, 1090 (4th Cir. 1993): the Court in *Lewis* noted that the use of voter registration rolls does not give rise to a prima facie case under the Sixth Amendment, holding that "the disparity between the proportion of eligible whites selected for master jury wheel and proportion of eligible minority persons selected must not exceed twenty percent." (Internal quotes omitted).

comparative disparity test. Brief in Opposition, p 16.[13] The Brief then states that the Sixth Circuit decision here did not establish a conflict, but rather that "*the conflict was already there.*" Brief in Opposition, p 16 (emphasis added). But regardless whether the Sixth Circuit created this conflict or merely confirmed an existing conflict, the fact of such a conflict is not a point in dispute. See Supreme Court Rule 10(a).

On this point, the Brief in Opposition then engages in a survey of the cases cited by the State from the nine circuits. In its analysis, the Brief attempts to distinguish several of the circuit decisions either by noting that the methods for drawing the prospective jurors was different from the one here, *United States v. Royal* (First Circuit) and *United States v. Rioux* (Second Circuit), or that the courts had relied on both the absolute disparity test and the comparative disparity test in rejecting the claim for relief, *United States v. Weaver* (Third Circuit) and *United States v. Orange* (Tenth Circuit). See Brief in Opposition, pp 14-19.

But for the remaining five circuits, the Brief in Opposition merely claims that these decisions were wrongly decided. This concession acknowledges that the conflict between the other circuits and the Sixth Circuit here is deep, and that these decisions cannot be reconciled.

For the Fifth Circuit's decision in *United States v. Butler,* the Brief in Opposition notes that the opinion was based on *Swain v. Alabama,*[14] which it characterized as a

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[13] Contrary to the Brief in Opposition's characterization, the First Circuit in *Royal* noted that this methodology applied in *Lewis* was different from both the absolute disparity and the comparative disparity test. *Royal,* 174 F.3d at 8.

[14] *Swain v. Alabama,* 380 U.S. 202 (1965).

"flawed" decision and that *Butler* was therefore unreliable. Brief in Opposition, p 16. The Brief describes the decision in *United States v. Ashley* for the Seventh Circuit as "outrageous." Brief in Opposition, p 17. The Brief then states that the decision in *United States v. Sanchez-Lopez* from the Ninth Circuit "is as about as bad as [*Ashley*]. Brief in Opposition, p 18. For the decision of the Eighth Circuit, *United States v. Rogers,* the Brief in Opposition decries the fact that the circuit was compelled to follow a previous decision which then required a denial of relief ("[i]t is a peculiarity and disgrace"). Brief in Opposition, p 18 n 3. Finally, for the Eleventh Circuit's decision in *United States v. Carmichael,* the Brief in Opposition argued that the decision "does not conform to *Duren* and enshrines systematic underrepresentation of minorities as legitimate." Brief in Opposition, p 19 n 4.

The Brief in Opposition suggests that the split in the circuits may be stale, noting that the decision in *Butler* from the Fifth Circuit was from 1980 and had not been cited for 25 years. Brief in Opposition, p 16. But any claim that this conflict is no longer relevant is belied by the fact that the two decisions from the Eleventh Circuit, *United States v. Carmichael* and *United States v. Clarke,* were released in March of 2009. The conflict is real, the issue is ripe, and it requires resolution.

Moreover, even for the four circuits that the Brief in Opposition attempts to distinguish, these decisions nevertheless directly conflict with the Sixth Circuit's decision here. The opinion of the First Circuit in *Royal* expressly rejected the comparative disparity test and elected to apply the absolute disparity test alone in denying the defendant relief, where there African Americans were 4.86% of the community but only 1.89% of

the prospective jurors.[15] The same is true in *Rioux* for the Second Circuit. The court there applied the absolute disparity test alone after examining the comparative disparity test where the claim of underrepresentation was approximately two percent absolute disparity for African Americans and Latinos in grand juries, but would have been approximately 30% and 50% in a comparative disparity analysis.[16] The court found there was no prima facie showing of underrepresentation and denied relief.

That the courts in *Royal* and *Rioux* were not addressing the issue of "siphoning" as in this case was of no moment where the comparative disparities that the courts were addressing were the same or higher to the ones at issue here. The courts found there was no prima facie showing of a violation of *Duren* under its second prong. Contrary to the Brief in Opposition, these cases also evidence the conflict among the circuits.

For the final two circuits, the Brief in Opposition asserted that the State had "mischaracterized" the decisions in *Weaver* and *Orange* because the Third and Tenth Circuits had relied on both the absolute disparity test and the comparative disparity test in examining the second prong of *Duren* in those cases. Brief in Opposition, pp 16, 18. The Brief in Opposition apparently misapprehends the nature of the argument that the State of Michigan is making here.

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[15] *Royal*, 174 F.3d at 7-10 ("this Circuit has rejected comparative disparity analysis and applied absolute disparity analysis in cases similar to the case at hand").

[16] *Rioux*, 97 F.3d at 656 ("We are satisfied that the absolute disparity approach is most appropriate for analyzing the underrepresentation claims in this case").

In both of those cases, the circuits rejected the claim under *Duren* that there was a showing of prima facie of unconstitutional underrepresentation even though the comparative disparities were *higher* than here and the courts examined the absolute disparity test in reaching this conclusion. The fact that the comparative disparity was also examined in these two cases does not change the point that the decisions there are in conflict with the Sixth Circuit's decision here, which relied exclusively on the comparative disparity test in finding a violation for a comparative disparity of 34%. In *Weaver,* the Third Circuit rejected the claim even though the comparative disparities for African Americans were higher than those alleged here, over 40%.[17] Again, the same is true for the decision in *Orange,* where the alleged comparative disparities were between 35% and 55% for the distinct groups at issue there.[18]

Thus, the Sixth Circuit's decision stands in opposition to the decisions of nine other circuits. There is profound disagreement between the Sixth Circuit and the other circuits on how to apply *Duren,* a point acknowledged by the Brief in Opposition at 13 ("Cases cited by [the State of Michigan] that fail to follow these rules, or that evade them by clever mathematical tests which depreciate persistent underrepresentation as

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[17] *Weaver,* 267 F.3d at 243 (" Looking first at the comparative disparity figures, we find that they are quite high – 40.01% and 72.98% – but that because African-Americans and Hispanics comprise such a small percentage of the population, the results of this analysis are of questionable probative value").

[18] *Orange,* 447 F.3d at 779 ("Here, the comparative disparity figures are less: 35.41%, 36.82%, 54.41%, and 54.97%, while the percentage of adult populations are roughly the same. As such, the comparative disparity figures here are insufficient to establish a prima facie case that the representation is not fair and reasonable.").

insignificant, are in conflict with the holdings of the United States Supreme Court").

2. This Court's decision in *Duren* did not "clearly establish" under AEDPA the test applied here by the Sixth Circuit.

In the State of Michigan's second argument in support of the petition, the State argued that there was no "clearly established" Supreme Court precedent under 28 U.S.C. § 2254(d) in which to conclude that the decision of the Michigan Supreme Court was unreasonable. As noted already, this same substantive claim has been rejected by nine other circuits under *Duren* on direct review. The very fact that four circuits have expressly refused to follow the comparative disparity test makes it plain that this method of determining if there is a fair representation of the community under *Duren's* second prong is not clearly established.

The Brief in Opposition acknowledges the point that the circuits have applied *Duren* differently than did the Sixth Circuit here. In its view, the other courts are wrong – it argues that "the mere fact some courts have strayed from the *Duren* ruling" is no basis on which to grant certiorari. Brief in Opposition, p 15. The Brief in Oppostion also stated that "in most jurisdictions of the United States, the rule of *Duren* cannot apply[.]" Brief in Opposition, p 20. But this is a significant concession. The fact that the other circuits have *on direct review* rejected the position taken by the Sixth Circuit demonstrates the point that the legal standard adopted here was not required by this Court in *Duren*.

On this point, the Brief in Opposition asserts that this Court in *Duren* did not apply the absolute disparity test. Brief in Opposition, p 21. A review of *Duren* contradicts this claim.

In *Duren,* this Court noted that 54% of the population of the county were women and that only 14.5% of the members of the venires were women.[19] The Court then determined that there was a "gross discrepancy" when comparing the percentage of women in the community to the women in the venires:

> Such a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community requires the conclusion that women were not fairly represented in the source from which petit juries were drawn in Jackson County.[20]

The use of the word "gross" in the phrase "gross discrepancy" here signifies the total difference, indicating a straight comparison of 54% with 14.5%. That is an absolute-disparity evaluation. There was no effort to examine the reduction in likelihood for women to serve as would occur in the comparative disparity test. The Third Circuit noted the same point that this Court applied the absolute disparity in *Duren* – even though it was not termed as such.[21]

The fact that the Brief in Opposition contested this point suggests it misunderstands the nature of the tests.

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[19] *Duren,* 439 U.S. at 363.

[20] *Duren,* 439 U.S. at 365-366.

[21] *Weaver,* 267 F.3d at 242 ("absolute disparity, which was the method employed in *Duren*, seems to be the preferred method of analysis in most cases"). See also *Royal,* 174 F.3d at 8, quoting Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel,* 103 Yale L.J. 1913, 1919-20 (1994)("While not explicitly endorsing any of the mathematical tests, the [*Duren*] Court seems to have considered only absolute disparity").

In the absolute disparity test, the result is yielded by subtracting the percentage of the distinct group in the venires from the percentage of the distinct group in the community.[22] It is a simple calculation. Here, during the sixth months at issue from April 1993 to October 1993 in Kent County, Michigan, African Americans were 7.28% of the adult population, and comprised 6% of the venires, an absolute disparity of 1.28%. The comparative disparity is determined by dividing the absolute disparity, 1.28%, by the percentage within the population, 7.28%, which here would result in an 18% comparative disparity. The numbers for the specific month of trial resulted in a 34% comparative disparity. Pet. App. 9a.

This Court in *Duren* engaged in a straightforward comparison of the percentages from the population and the venires. It did not engage in a comparative disparity analysis. In brief, the comparative disparity test was not established by the United States Supreme Court.

The Brief in Opposition cited *Norris v. Alabama* and argues that this Court has previously adopted the comparative disparity test. Brief in Opposition, p 24.[23] But that case was not based on the Sixth Amendment right to have one's jury drawn from a fair cross section of the community, but was based on the Equal Protection Clause that the process for selecting jurors was discriminatory.[24] The case does not apply for analysis under the Sixth Amendment.

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[22] See *Rioux*, 97 F.3d at 655 for a description of the calculation methods for absolute disparity and comparative disparity.

[23] *Norris v. Alabama*, 294 U.S. 587 (1935).

[24] See *Castenada v. Partida*, 430 U.S. 482 (1977).

Thus, the standards established by the Sixth Circuit in this case were newly adopted, and were not established by this Court's decision in *Duren*. There was no basis in habeas review to conclude that the Michigan Supreme Court's decision was an unreasonable application of clearly established Supreme Court precedent. This is another reason this Court should grant certiorari to ensure that the Sixth Circuit faithfully applies the AEDPA standards to ensure that the province of the State courts is not invaded by second-guessing on habeas review.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Attorneys for Petitioner

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AMICUS CURIAE BRIEF

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No. 08-1402

In The
Supreme Court Of The United States

MARY BERGHUIS, WARDEN
Petitioner,

v.

DIAPOLIS SMITH
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE CONNECTICUT AND SIX OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KEVIN T. KANE
Chief State's Attorney

HARRY WELLER
Senior Assistant State's Attorney
Appellate Bureau

MICHAEL E. O'HARE*
Supervisory Assistant State's Attorney
Office of the Chief State's Attorney
Civil Litigation Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5887
Fax (860) 258-5968

Counsel of Record

JOHN W. SUTHERS
Attorney General
State of Colorado
1525 Sherman St., 7th Floor
Denver, Colorado 80203

RICHARD S. GEBELEIN
Chief Deputy Attorney General
State of Delaware
Department of Justice
820 N. French Street
Wilmington, Delaware 19801

GARY K. KING
Attorney General of New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

RICHARD CORDRAY
Attorney General of Ohio
30 East Broad St., 17th Floor
Columbus, Ohio 43215

LAWRENCE E. LONG
Attorney General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Suite #230
PO Box 142320
Salt Lake City, Utah 84114-2320

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in ruling that the Michigan Supreme Court had applied "clearly established Federal law" unreasonably when it rejected a state prisoner's Sixth Amendment fair cross section claim because the prisoner had failed to demonstrate a constitutionally significant underrepresentation of a distinctive group and that any such underrepresentation was the result of the "systematic exclusion" of that group, and in granting the prisoner relief pursuant to 28 U.S.C. § 2254.

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INTERESTS OF THE AMICI CURIAE

The State of Connecticut, and the six other states that join in this brief, have a compelling interest in defending the presumptively valid judgments of their courts against post conviction claims in federal court. Accordingly, the *amici* states have an equally compelling interest in ensuring that the lower federal courts properly apply the standard of review for federal habeas corpus claims proscribed by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In addition, because the *amici* states must defend the jury selection process employed by their courts against constitutional challenges raised by criminal defendants, they have a strong interest in ensuring that the lower federal courts properly apply the law governing the Sixth Amendment's guarantee of a jury drawn from a fair cross section of the community. The Sixth Circuit's decision in this case implicates all of these concerns. Allowing the decision to stand would have a detrimental impact on both the ability of the *amici* states to defend criminal convictions obtained in their courts against federal habeas corpus challenges and to defend the jury selection process employed in their court systems against fair cross section claims. The *amici* states, therefore, have a substantial interest in this Court's determination of whether to review the Sixth Circuit's decision.[1]

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[1] Article XXIII of the Amendments to the Constitution of the State of Connecticut established "within the executive department a division of criminal justice which shall be in charge of . . . prosecution of all criminal matters" and designated the chief state's attorney as the head of the division. Connecticut General

(continued...)

STATEMENT

The Respondent, Diapolis Smith, was convicted of second degree murder after a jury trial in the Circuit Court for Kent County, Michigan. In the trial court, the Respondent claimed that he was denied his Sixth Amendment right to a jury drawn from a fair cross section of the community under *Duren v. Missouri*, 439 U.S. 357 (1979). The Respondent contended that the systematic exclusion of African Americans during the jury selection process resulted in a constitutionally significant underrepresentation of African Americans in the venire from which his jury was drawn.

The evidence adduced in the trial court showed that 7.28 percent of the jury-eligible population of Kent County was African American. Between April 1993 and October 1993, the period during which the Respondent's trial took place, 929 prospective jurors were selected from the county. If prospective jurors were selected from the eligible population entirely at random, 68 of those selected would have been African American. The

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[1](...continued)
Statutes § 51-278(c) provides that the chief state's attorney is responsible for "all appellate . . . and postconviction proceedings arising out of . . . any criminal action whether . . . denominated civil or criminal for other purposes." Thus, under Connecticut law, the chief state's attorney serves as the equivalent of the attorney general for criminal matters. Therefore, Supreme Court Rule 37.4 permits the chief state's attorney of Connecticut, as well as the attorneys general for the other *amici* states, to file supporting briefs on behalf of their respective states without the permission of the parties. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

evidence showed, however, that 56 of the prospective jurors selected were African American. *People v. Smith*, 463 Mich. 199, 211-12 (2000).

The evidence also showed that after prospective jurors were selected, some were assigned to serve as jurors in the district courts of the county. Prospective jurors who were not selected in the district courts were available to serve as jurors in circuit court. *People v. Smith*, 463 Mich. at 210-211. The City of Grand Rapids, which is located in Kent County, is served by the 61st District Court. Id., at 210. Under Michigan law, only residents of Grand Rapids could be selected for jury service in the 61st District Court. *Smith v. Berghuis*, 543 F.3d 326, 331-32 (6th Cir. 2008). The population of Grand Rapids was 18.5 percent African American; *People v. Smith*, supra, 211; and 85 percent of the African American population of Kent County resided in the city. *Smith v. Berghuis*, supra, 344. The record, however, included no evidence regarding the effect that the preliminary selection of district court jurors from the county jury pool had on the number of African American jurors ultimately available to serve in the circuit court.

The trial court rejected the Respondent's fair cross section claim and denied relief. The Respondent appealed and the state Court of Appeals reversed. The prosecution then sought leave to appeal which was granted by the Michigan Supreme Court. *People v. Smith*, 463 Mich. at 212-13. On appeal, the Supreme Court rejected the Respondent's claim because he had failed to make the required showings with respect to

either the second or third prongs of the *Duren* test. Id. at 202-205.

In ruling on the Respondent's claim that African Americans were underrepresented in his jury venire, the Michigan Supreme Court observed that since *Duren*, the lower federal courts have used three different methods of measuring fair and reasonable representation. The court noted that each method had weaknesses and each was subject to criticism. *People v. Smith*, 463 Mich. at 203-204. The court concluded, therefore, that "no individual method should be used exclusive of the others" and instead adopted a case by case approach. Id., at 204. The court rejected the Respondent's claim because he had failed to show a constitutionally significant disparity under either of the two most commonly used methods, absolute disparity or comparative disparity. Id., at 205-205.[2]

Despite the fact that it found no constitutionally significant underrepresentation, the Michigan court went on to consider the Respondent's claim that African Americans were systematically excluded from the jury venire. The Respondent claimed that African Americans were systematically excluded from being prospective jurors in the Kent County Circuit Court in three ways. First, he claimed that the practice of

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[2] With respect to the third method, which is known as the standard deviation test, the Michigan Supreme Court quoted the Second Circuit in noting that "no court in the country has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." (Alteration in original.) *People v. Smith*, 463 Mich. at 204, quoting *United States v. Rioux*, 97 F.3d 648, 655 (2nd Cir. 1996).

excusing prospective jurors for reasons such as lack of transportation or child care had a disproportionate effect on African Americans. Second, he claimed that Kent County's failure to aggressively pursue persons not responding to the initial questionnaire or to follow up on questionnaires returned as undeliverable reduced the number of potential African American jurors. Finally, he claimed that the pool of African American jurors available to serve in the circuit court was diminished by the selection of jurors from Grand Rapids to serve in the 61st District Court. *People v. Smith*, 463 Mich. at 224-26.

The Michigan Supreme Court rejected the Respondent's claim that African Americans were systematically excluded from the jury venire. The court concluded that the first two problems cited by the Respondent were outside factors that were not "inherent in the particular jury selection process . . . used by Kent County." *People v. Smith*, 463 Mich. at 226; see *Duren*, 439 U.S. at 366. The court also rejected the Respondent's claim that selecting jurors for the district courts from the county juror pool "siphoned away" prospective African American jurors from the circuit court. The court concluded that the Respondent failed to carry his burden of proof by presenting evidence to show that the practice did, in fact, diminish the number of African American jurors available for service in the circuit court. *People v. Smith*, supra, 225.

Thereafter, the Respondent filed a petition for a writ of habeas corpus pursuant to § 2254 claiming, *inter alia*, that he was denied his right to a jury drawn from a fair cross section of the community. The district

court denied the Respondent's petition. *Smith v. Berghuis*, 543 F.3d at 333. The Respondent appealed and the Sixth Circuit reversed, concluding that "the Michigan Supreme Court unreasonably applied *Duren*'s three prong test in rejecting [the Respondent's] Sixth Amendment claim." Id. at 336. Because it is clear that African Americans are a distinctive group; see *Peters v. Kiff*, 407 U.S. 493, 503 (1972); the court indicated that it would address "only the second and third prong of the *Duren* prima facie test and the relative Michigan state court findings." *Smith v. Berghuis*, supra, 336.

In addressing the Respondent's claim regarding the second prong of the *Duren* test, the Sixth Circuit acknowledged that "the absolute disparity between jury-eligible African Americans and those that actually appeared for venire panels was 1.28 percent." *Smith v. Berghuis*, 543 F.3d at 337. Such a disparity falls far below the level that would establish a constitutionally significant underrepresentation for the purposes of *Duren*. See, e.g., *United States v. Rioux*, 97 F.3d 648, 658 (2nd Cir. 1996) (2.14 absolute disparity "statistically insignificant"); *United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir.), cert. denied, 519 U.S. 985 (1996)(4.9 absolute disparity constitutionally acceptable); *United States v. Biaggi*, 909 F.2d 662, 677-78 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) (4.7 absolute disparity not "a violation of the fair cross-section requirement").[4]

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[4] "[T]he absolute disparity method measures the difference between the group's representation in the population and in the jury pool." *United States v. Rioux*, supra, 656.

The Sixth Circuit, however, questioned "the wisdom of applying the absolute disparity test to the small African American population of Kent County . . ." *Smith v. Berghuis*, 543 F.3d at 337. The court, citing *United States v. Jackman*, 46 F.3d 1240, 1247 (2nd Cir. 1995) and *Foster v. Sparks*, 506 F.2d 805, 835 (5th Cir. 1975), concluded that "[w]here the distinctive group alleged to have been underrepresented is small . . . the comparative disparity test is the more appropriate measure of underrepresentation. *Smith v. Berghuis*, supra, 338.[4]

The Sixth Circuit then noted that application of the comparative disparity test to the Kent County venire panels revealed that African Americans were underrepresented by 18 percent in the six months preceding the Respondent's trial and by 15 percent in ten of the eleven months after trial. *Smith v. Berghuis*, 543 F.3d at 336-38. As with the absolute disparity in this case, these figures fall far below the level of comparative disparity needed to establish underrepresentation for the purposes of *Duren*. See, e.g., *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996) (comparative disparity of 33 percent insufficient to satisfy second prong of *Duren*); *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3rd Cir. 1992), cert. denied, 508

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[4] The comparative disparity method "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3rd Cir. 1992), cert. denied, 508 U.S. 947 (1993). Comparative disparity is calculated by dividing the "absolute disparity" in the groups representation by its percentage of the population and then multiplying by 100 percent. *Rioux*, 97 F.3d at 655.

U.S. 947 (1993)(rejecting a fair cross section claim based on a comparative disparity of 40 percent); *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990)(comparative disparity of 40 percent not large enough to establish unreasonable representation under *Duren*).

The Sixth Circuit, nevertheless, determined that the Respondent met the requirements of the second prong of the *Duren* test because of an increase in the comparative disparity during the month in which the Respondent's trial took place. The court noted that the comparative disparity during this month "increased to 34 percent." *Smith v. Berghuis*, 543 F.3d at 338. Based on the 34 percent comparative disparity during the month of the trial and the 18 percent comparative disparity in the six preceding months, the court concluded that the Respondent had "established that African Americans were underrepresented on Kent County venire panels." Id.[5]

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[5] The Sixth Circuit cited *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) and *Ramseur v. Beyer*, 983 F.2d at 1232, in support of its conclusion that a comparative disparity of 34 percent established constitutionally significant underrepresentation for the purposes of *Duren*. While the Eighth Circuit's decision in *Rogers* provides at least equivocal support for the court's conclusion, the Third Circuit's decision in *Ramseur* stands for precisely the opposite proposition. In *Ramseur*, the Third Circuit described a comparative disparity of 40 percent as being "borderline" and "at the margin of the range found acceptable by the courts." *Rasmeur v. Beyer*, supra, 1232. The court, nevertheless, concluded that the evidence did not "convincingly demonstrate that the representation of African-Americans on jury pools was unfair or unreasonable." Id., at 1235.

In order to prevail on the third prong of the *Duren* test, the Respondent had to show that the underrepresentation of African Americans was due to their "systematic exclusion . . . from the jury selection process." *Duren v. Missouri*, 439 U.S. at 364. In this case, the Sixth Circuit's analysis of the third prong was based on its conclusion that the Respondent had "demonstrated that African Americans were underrepresented on Kent County venire panels by between 15 and 18 percent over a period of 17 months and 34 percent in the month during which his jury was drawn." *Smith v. Berghuis*, 543 F.3d at 340. The court observed that "[w]hile this disparity may not rise to the level of demonstrating systematic exclusion *per se*, this persistent disparity combined with the petitioner's evidence that this disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*." Id. The court concluded, therefore, that the Respondent had "demonstrated that the underrepresentation of African Americans was 'inherent in the particular jury-selection process utilized,' and [that he had] met his burden to demonstrate that African were systematically excluded from Kent County venire panels." Id.

ARGUMENT

In *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), the Sixth Circuit granted *habeas corpus* relief and ordered a new trial for a state prisoner challenging his conviction pursuant to 28 U.S.C. § 2254. The Sixth Circuit held that the Michigan Supreme Court unreasonably applied this Court's ruling in *Duren v. Missouri*, 439 U.S. 357 (1979), when it rejected the

prisoner's Sixth Amendment fair cross section claim. The Sixth Circuit ruled that the Michigan court had applied both the second and third prongs of the *Duren* test unreasonably. The Sixth Circuit concluded that the Michigan court's application of the second prong of the test was unreasonable because it failed to apply the "comparative disparity" test to determine whether there was a constitutionally significant underrepresentation of African Americans in the venire. *Smith v. Berghuis*, 543 F.3d at 338-39. The Sixth Circuit also concluded that the Michigan court's application of the third prong of the test was unreasonable when it found that the petitioner had failed to meet his burden of showing that the underrepresentation was the result of a "systematic exclusion" of African Americans. The Sixth Circuit concluded that the persistence of the disparity along with evidence that the disparity was not random supported the conclusion that African Americans were systematically excluded from the venire. *Id.*, at 340-41.

The Sixth Circuit's decision in *Smith v. Berghuis* constitutes error for two reasons. First, the decision is based on a misapplication of federal law governing Sixth Amendment fair cross section claims. Specifically, the Sixth Circuit erred in ruling that the Michigan Supreme Court was required to apply the comparative disparity test in determining whether there was a constitutionally significant underrepresentation of African Americans in the venire and that the systematic exclusion of African Americans could be inferred from such factors as the persistence of the disparity and the fact that the disparity could not result from the random selection of jurors. Second, the Sixth Circuit erred in ruling that the Michigan Supreme Court's decision

involved an unreasonable application of "clearly established Federal law," as determined by this Court, and in granting relief under 28 U.S.C. § 2254.

A. The Sixth Circuit Erred in Ruling That the Respondent Was Denied His Sixth Amendment Right to a Jury Drawn from a Fair Cross Section of the Community

The Sixth Amendment guarantees the defendant in a criminal prosecution the right to trial by a fair and impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court stated that in order to ensure fairness and impartiality, the jury must be "a body that is truly representative of the community . . . and not the organ of any special group or class." (Citation and quotation marks omitted.) Id., at 527. Thus, "the selection of the petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." Id., at 528. Accordingly, the Sixth Amendment requires that potential jurors be drawn from a venire that is a "fair cross section of the community." Id., at 530.

Nevertheless, the *Taylor* court recognized that "[t]he fair-cross-section principle must have much leeway in application." Id., at 537-38. The court noted that "[s]tates remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may fairly be said that the jury lists or panels are representative of the community." Id., at 538. The court emphasized that while "petit juries must be drawn from a source fairly representative of the

community [there is] no requirement that petit juries actually chosen mirror the community and reflect the distinctive groups in the population." Id. Thus, "[d]efendants are not entitled to a jury of any particular composition . . . but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id., see *Swain v. Alabama*, 380 U.S. 202, 208 (1965) (jury venire not constitutionally required to precisely mirror community).

In *Duren v. Missouri*, supra, this Court identified three factors that a defendant must establish to make a prima facie showing that his right to a jury drawn from a fair cross section of the community has been violated. Under the *Duren* test, the defendant must prove:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systemic exclusion of the group from the jury selection process.

Duren, 439 U.S. at 364. Once the defendant has made a prima facie showing of an infringement of his right to a jury drawn from a fair cross section of the community, "the State bears the burden of justifying this infringement by showing attainment of a fair cross

section to be incompatible with a significant state interest." Id., at 368; see *Taylor*, 419 U.S. at 533-35.

When the Sixth Circuit's decision in *Smith v. Berghuis* is carefully considered, it becomes clear that the court of appeals failed to heed this Court's admonition that "[t]he fair-cross-section principle must have much leeway in application." *Taylor v. Louisiana*, 419 U.S. at 537-38. Instead, the court proceeded on the assumption that the Sixth Amendment requires that jury venires precisely, or at least closely, reflect the racial and ethnic composition of the communities from which they are drawn. Consequently, the Sixth Circuit took the Kent County court system to task for its failure to produce the idealized jury pool that the court wrongly believes the Sixth Amendment requires. The Sixth Circuit's misconception regarding the fair-cross-section requirement led the court into error in its application of both the second and third prongs of the *Duren* test.

1. The Sixth Circuit erred in ruling that the representation of African Americans in the venire was not fair and reasonable

The second prong of the *Duren* test required the Respondent to demonstrate that the representation of African Americans in the Kent County jury venire was not fair and reasonable. *Duren v. Missouri*, 439 U.S. at 364. The Michigan Supreme Court ruled that the Respondent failed to make the required showing under the second prong of the test. The Sixth Circuit reversed the Michigan court and ruled that the Respondent had demonstrated a constitutionally significant underrepresentation of African Americans in the venire.

The Sixth Circuit's ruling was error for three reasons. First, the court erred in ruling that the comparative disparity test was the appropriate method for measuring underrepresentation in this case. Second, the court erred in basing its decision on the results of the juror selection process for a single month. Third, the court erred in ruling that the results of the comparative disparity test for that month showed a constitutionally significant underrepresentation of African Americans.

In this case, the Michigan Supreme Court used both the absolute disparity test and the comparative disparity test to make its determination that the Respondent had failed to demonstrate a significant underrepresentation of African Americans. *People v. Smith*, 463 Mich. at 204-205. In contrast, the Sixth Circuit concluded that "[w]here the distinctive group alleged to be underrepresented is small . . . the comparative disparity test is the more appropriate measure of underrepresentation." *Smith v. Berghuis*, 543 F.3d at 338. The Sixth Circuit's decision to rely exclusively on the comparative disparity test is contrary to the overwhelming weight of authority among the other circuits.

The comparative disparity test is generally disfavored because it "tends to magnify the size of the disparity as the relevant group's percentage of the population decreases." *United States v. Haley*, 521 F.Supp. 290, 292 (N.D.Ga. 1981). Indeed, in *United States v. Whitely*, 491 F.2d 1248 (8th Cir.), cert. denied, 416 U.S. 990 (1974), the Eighth Circuit concluded that the comparative disparity test "distorts reality" when

applied to a group which constitutes a small percentage of the population. Id., at 1249. Accordingly, comparative disparity has been consistently rejected as the appropriate method for measuring underrepresentation for fair cross section claims. See, e.g., *United States v. Sanchez-Lopez*, 879 F.2d 541, 548 (1989) (comparative disparity disfavored because it exaggerates effect of any deviation); *United States v. Hafen*, 726 F.2d 21 (1st Cir.), cert. denied, 466 U.S. 962 (1984) (comparative disparity "ordinarily inappropriate" where relevant population is small); *United States v. Rioux*, supra, 655 (rejecting use of comparative disparity test). Accordingly, the Sixth Circuit's decision to rely exclusively on the comparative disparity test was error.

Moreover, in order to prevail on the second prong of the *Duren* test, the Respondent had to show a "substantial underrepresentation [of African Americans] over a significant period of time. . . ." *Ramseur v. Beyer*, 983 F.2d at 1234. Although there was evidence in the case pertaining to the juror selection process in Kent County over a period of seventeen months, the Sixth Circuit's ruling was based, almost entirely, on the results of the selection process for one month. *Smith v. Berghuis*, 543 F.3d at 340. When the evidence from the entire period is considered, it is clear that the juror selection process was operating well within the requirements of the Sixth Amendment. Because of the small number of prospective jurors summoned in Kent County each month and the small African American population of the county, it would only have taken a difference of a few African American jurors to create a significant change in the comparative disparity. Thus, it was error for the Sixth Circuit to find

underrepresentation of African Americans based primarily on evidence from a single month.

Finally, the Sixth Circuit ruled that a 34 percent comparative disparity in the jury venire during the month in which the Respondent was tried established a constitutionally significant underrepresentation of African Americans. *Smith v. Berghuis*, 543 F.3d at 338. It is well established, however, that a comparative disparity of 34 percent does not rise to the level of a constitutional violation. See, e.g., *Swain v. Alabama*, 380 U.S. at 208-209 (comparative disparity of 42 percent permissible); *Ramseur v. Beyer*, 983 F.2d at 1232 (comparative disparity of 40 percent at margin of range found acceptable); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981)(comparative disparity of 46 percent does not rise to level of substantial underrepresentation); *United States v. Test*, 550 F.2d 577, 589 (10th Cir. 1976)(comparative disparity of 46 percent found not to be substantial). Accordingly, the Sixth Circuit erred in ruling that the 34 percent comparative disparity was constitutionally significant.

2. The Sixth Circuit erred in ruling that systematic exclusion of jurors could be inferred from the facts of the case

In order to prevail on the third prong of the *Duren* test, the Respondent had to prove that the underrepresentation of African Americans in the venire was the result of systematic exclusion. *Duren v. Missouri*, 439 U.S. at 364. On direct appeal, the Michigan Supreme Court rejected the Respondent's claim, ruling that he had presented no evidence to show

that the exclusion of African American jurors was the result of any factor "inherent in the particular jury selection process utilized." *People v. Smith*, 463 Mich. at 224. On appeal from the denial of the Respondent's federal habeas petition, the Sixth Circuit ruled that the Michigan court applied federal law unreasonably when it held that the underrepresentation of African Americans in the county jury venire was not the result of systematic exclusion. *Smith v. Berghuis*, 543 F.3d at 340.

. . . . . .

The Sixth Circuit reasoned that the "persistent disparity" in the county court venires "combined with [the Respondent's] evidence that the disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*." *Smith v. Berghuis*, supra, 340. In reaching its decision, the court observed that "the extremely low probability that the underrepresentation would have occurred by chance provides . . . evidence that the system itself contributed to the lack of African Americans in the venire pools." Id., quoting *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996). In addition, the court noted that Kent County allowed prospective jurors to "opt out" of jury service if it would result in hardship based on child care, transportation or the inability to take time off from work. *Smith v. Berghuis*, supra, 340. Although the policy applied to all persons summoned for jury service, the court speculated that it "would likely disproportionately exclude African Americans." Id., at 341. The court also took note of the county's practice of diverting prospective jurors from the circuit court to the district courts. Id., at 342. Although there was no evidence regarding the effect that this practice had on

the number of African Americans serving as jurors in the circuit court, the Sixth Circuit found that the diversion of prospective jurors did reduce the number of African Americans available to serve as jurors in that court. Id. Consequently, the Sixth Circuit stated that "the lack of random selection in the Kent County jury selection process leads us to conclude that the underrepresentation of African American resulted from processes 'inherent in the particular jury-selection process utilized.'" Id., at 341, quoting *Duren*, 439 U.S. at 366.

The Sixth Circuit's ruling is contrary to the weight of authority in the other circuits. In order to prevail on his claim, the Respondent had to show that the underrepresentation of African Americans was due to their "systematic exclusion in the jury selection process." *United States v. Pion*, 25 F.3d 18, 22 (1st Cir.), cert. denied, 513 U.S. 932 (1994). In order to prove systematic exclusion, the Respondent had to prove that African Americans were treated differently, and that the difference in their treatment impaired their ability to serve as jurors. *United States v. Footracer*, 189 F.3d 1058, 1061 (9th Cir. 1999). In this case, there is nothing in the record to suggest that Kent County treated African Americans differently in its juror selection process. The Sixth Circuit, therefore, had no basis from which to infer systematic exclusion of African Americans from the jury venire.

Moreover, the showing of a "'mere statistical underrepresentation, without evidence of actual discriminatory or exclusionary practices' [is] insufficient to establish 'a prima facie violation of the sixth

amendment fair cross-section requirement.'" *United States v. Cecil*, 836 F.2d 1431, 1446 (4th Cir.), cert. denied, 487 U.S. 1205 (1988), quoting *United States v. Lynch*, 792 F.2d 269, 271 (1st Cir. 1986). Indeed, in *Truesdale v. Moore*, 142 F.3d 749 (4th Cir.), cert. denied, 525 U.S. 951 (1998), the Fourth Circuit observed that allowing the petitioner to "substitute evidence of substantial underrepresentation for evidence of systematic exclusion would go a long way towards requiring perfect statistical correspondence between racial percentages in the venire and those in the community. Such a rule would exalt racial proportionality over neutral jury selection procedure." Id., at 755. Thus, the Sixth Circuit's reliance on the "persistence" of the disparity in support of its decision is misplaced.

Finally, in *United States v. Orange*, 447 F.3d 792 (10th Cir. 2006), the Tenth Circuit held that "[d]iscrepancies resulting from the private choices of potential jurors . . . do not represent the kind of constitutional infirmity contemplated by *Duren*." Id., at 800. "[C]ourts have uniformly maintained that [personal] predilections cannot form the basis of a cognizable class and evoke judicial sanctions against the selection system." *United States v. Cecil*, 836 U.S. at 1447. Thus, the private decision of certain prospective jurors to "opt out" of jury service for reasons related to child care, transportation or employment cannot serve as the basis for a finding of systematic exclusion of African Americans. Accordingly, the Sixth Circuit erred in ruling that the Respondent established the systematic exclusion of African Americans on this record.

B. The Sixth Circuit Ruling Was Not Based on Clearly Established Federal Law as Determined by the United States Supreme Court

In this case, the Sixth Circuit ruled that the Respondent was entitled to relief under 28 U.S.C. § 2254(d)(1) because the Michigan Supreme Court unreasonably applied this Court's ruling in *Duren v. Missouri*, supra, when it rejected his Sixth Amendment fair cross section claim. The Sixth Circuit erred in granting relief because its rulings on the second and third prongs of the *Duren* test were not based on clearly established federal law as determined by the decisions of this Court.

The standard governing review of claims by federal habeas corpus petitioners is set forth in § 28 U.S.C 2254 (d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"). Section 2254 (d) provides, in pertinent part, as follows:

> (d) An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . .

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor, writing for the court, observed that § 2254(d)(1) "prohibits a federal court from granting a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., at 399. Justice O'Connor explained that "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of the this Court as of the time of the relevant state-court decision." Id., at 411. Justice O'Connor stated, therefore, that "§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." Id.

Here, the Sixth Circuit's' decision is not based on "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). While the court acknowledged the AEDPA standard; *Smith v. Berghuis*, 543 F.3d at 334-35; it failed to apply that standard when conducting its review of the Michigan Supreme Court's ruling.

In rejecting the Respondent's claim on direct review, the Michigan Supreme Court's held that the Respondent had failed to show a constitutionally significant disparity under either absolute or comparative disparity. *People v. Smith*, 463 Mich. at 204-205. The Sixth Circuit held this ruling to be an unreasonable application of federal law because it deemed the "comparative disparity test to be the more

appropriate measure of underrepresentation." *Smith v. Berghuis*, 543 F.3d at 338. The Sixth Circuit reached this conclusion despite the fact that there is absolutely no authority under this Court's precedent to support it. The Sixth Circuit then conducted its own analysis using the comparative disparity test, applied a different standard for determining whether the disparity was substantial, and reached a different result than the state court, all without support from this Court's jurisprudence. Id., at 338-39. It is clear, therefore, that the Sixth Circuit did nothing more than replace the judgment of the Michigan Supreme Court with its own judgment. When reviewing the Michigan Supreme Court's ruling on the third prong of the *Duren* test, the Sixth Circuit did essentially the same thing. It conducted its own analysis, applied different standards and reached a different result, all without authority from this Court's precedent. *Smith v. Berghuis*, supra, 339-45.

Indeed, this Court has never addressed the issue of which method should be used to determine whether a constitutionally significant underrepresentation exists in a jury venire. This Court has consistently held that habeas relief should not be granted where no decision of the court "squarely addresses the issue in the case. . . ." *Wright v. Van Patten*, 128 S.Ct. 743, 746 (2008); see also *Carey v. Musladin* , 549 U.S. 70, 75-77 (2006). Moreover, where, as here, a state court has decided an issue on which the federal courts are divided, AEDPA bars federal habeas corpus relief. See *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005).

In *Lockyer v. Andrade*, 538 U.S. 63 (2003), this Court stated that "the only question that matters under § 2254(d)(1) [is] whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law." Id., at 71. When reviewing the Michigan Supreme Court's ruling in this case, the Sixth Circuit did not even consider that question. Accordingly, the Sixth Circuit decision is error and should be reversed.

CONCLUSION

For the foregoing reasons and those presented by the Petitioner, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

KEVIN T. KANE
Chief State's Attorney
State of Connecticut

HARRY WELLER
Senior Assistant State's Attorney
Appellate Bureau
Office of the Chief State's Attorney

MICHAEL E. O'HARE
Supervisory Assistant State's Attorney
Counsel of Record
Civil Litigation Bureau
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, Connecticut 06067

Counsel for Amici Curiae

June 15, 2009

JOINT APPENDIX

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(5)

No. 08-1402

Supreme Court, U.S.
FILED
NOV 17 2009
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In the Supreme Court of the United States

MARY BERGHUIS, WARDEN,
Petitioner,

v.

DIAPOLIS SMITH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CORRECTED JOINT APPENDIX

James Sterling Lawrence
Attorney at Law
828 W. Eleven Mile Rd
Royal Oak, MI 48067
(248) 399-6930
ynot@earthlink.net
Attorney for Respondent

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124
restucciac@michigan.gov

Attorneys for Petitioner

dis 3 HASTOL 5AJZ63

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2009 U.S. S. Ct. Briefs LEXIS 1172

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit found that there was a violation of the right to a fair cross section in the jury under the Sixth Amendment and Fourteenth Amendment.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

The Fourteenth Amendment provides in Section 1 in part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The prisoner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

> law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With regard to factual determinations by the State court under 28 U.S.C. § 2254(e)(1), the federal courts must accord a presumption unless rebutted by clear and convincing evidence:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATE OF MICHIGAN
17TH JUDICIAL CIRCUIT COURT (KENT COUNTY)
PEOPLE OF THE STATE OF MICHIGAN
VS
DIAPOLIS TIANT SMITH
KENT COUNTY CIRCUIT COURT NO. 92-60735-FC
JURY TRIAL – VOLUME 1
HONORABLE MICHAEL R. SMOLENSKI
SEPTEMBER 13, 1993

* * *

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Thank you, your Honor.

THE COURT: All right. Anything for cause from the People?

MR. VANDERMOLEN: None for the People, your Honor.

THE COURT: Peremptorily from the People?

MR. VANDERMOLEN: No. People are still very happy with the jury.

THE COURT: I don't think there are any peremptories left here, Mr.--

MR. PLASZCZAK: No, your Honor, but I do have a motion to be made outside the presence of the jury.

THE COURT: All right. Any challenges for cause?

MR. PLASZCZAK: No. No challenges for cause, your Honor.

THE COURT: All right. Then what we have is our jury panel, and we have to take care of a matter outside of your hearing. But we're going to excuse the rest of the panel. We need a volunteer to take the capsules upstairs. And I want to thank you very much for your patience this afternoon. I hope to see you in a couple weeks on another trial.

(At 4:10 p.m., jurors excused)

THE COURT: Now we're on the record with no jurors here at all, no one from the overall panel and no one of our 14 jurors. The jury has not yet been sworn. We have

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not given them their trial instructions, but I wanted to give Mr. Plaszczak the opportunity to put anything on the record. He indicated he had a motion.

MR. PLASZCZAK: Yes. May it please the Court, first of all, there are two life offenses in this case, the allegation of murder and then the allegation of assault with intent to commit murder, which I believe is also a life offense. Under the Court Rule we are allowed 12 peremptory challenges if there's a life offense, and I believe the Court Rule is MCR 6.412, sub (c).

It is my feeling that because there are two life offenses in this case that we should be allowed challenges on each life offense, peremptory challenges in an equal amount, which would be a total of 24 peremptory challenges, and we would ask the Court to grant that motion. We have exhausted, by my count and I'm sure by the Court's count, the 12 for one life offense. At least that's what my count shows, and I'm assuming it agrees with the Court, but we would ask the Court to grant us those additional peremptory challenges.

THE COURT: All right. Thank you.

Mr. VanderMolen?

MR. VANDERMOLEN: I oppose that, your Honor. I've never – it's always been my understanding and I don't have any authority that I can put my hands on at this moment,
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although I think I can find it, but my experience has been that it didn't matter how many counts. It was the total –the highest possible charge or the most serious charge that determined the amount of peremptory challenges, and that would be 12 here. And as I understand it, that's what is allowed under the circumstances, even though there are two counts, that the number of challenges allotted to each aide is 12 total each, which is noted to have been used by the defense.

THE COURT: Well, the Court Rule in Michigan here is 6.412(e), which is peremptory challenges. And the thrust of the Court Rule regarding peremptory challenges by right is attached to the number of defendants, not the number of charges.

Now, I note that if there's more than one defendant on trial, each defendant can go down to as few as seven peremptory challenges even if they're facing life imprisonment so that the obvious point here of the Court Rule is to limit the number of total peremptory challenges under situations where there's more than one defendant. I can't imagine that simply because he has two separate charges that there would be 24 peremptory challenges.

And I think the obvious thing is also that although I'm not sure whether felony firearms -- I think they have to be served consecutively. We're jumping the gun a whole

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lot here, but just in terms of exposure in terms of penalties, it would seem to me that the life potential penalties here would have to be served concurrently.

And so I really don't understand what the additional jeopardy is, but I rely on the Court Rule, which seems to rely upon the number of defendants rather than the number of counts.

Now, of course, Subsection 2 says that on a showing of good cause the Court may grant one or more of the parties an increased number of peremptory challenges, and I -- but I haven't heard anything which amounts to good cause.

I don't know what the -- if you have something there, Mr. Plaszczak.

MR. PLASZCZAK: That may be related to my second motion, your Honor.

THE COURT: All right. Go ahead.

MR. PLASZCZAK: I would indicate to the Court that, of course, my client is a black person, and there are

no blacks that have ended up on the 14 people that are now sitting in the jury box. I could not count exactly how many potential jurors that we have, but it looked there were somewhere -- I'm guessing -- perhaps a hundred or so. I did note that there were, I believe, either two or three blacks of the people there. I think I counted two. There
[Page 149]
might have been a third black person in the potential jurors that were brought down, and I'm concerned that we have no blacks on the jury as it sits now, and I would approach that problem in two ways.

First of all, I would ask that the Court grant us additional peremptory challenges so that we could attempt to have a person -- a black person sitting on the jury, at least one.

Secondly is that I would, because of the situation as it exists and that it appears that we have a situation where there wee a very slim chance of us having a black person on the jury and that there are just very few blacks on the available from what could see that were brought in to sit on the jury that we had to choose from. And the percentage seems to be very, very, very low.

And I don't know about the selection procedure. I'm assuming it's done by -- the same as in all other courts, but it does appear that there is some problem with the selection procedure because we ended up with a very low percentage of blacks on the jury, which is very serious from our standpoint since Mr. Smith is a black person.

THE COURT: All right. Thank you.

Mr. VanderMolen?

MR. VANDERMOLEN: I oppose the motion, your Honor. I submit that the selection process is fair and impartial;
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that there is no racial significance given to the selection of members for the panel. It's just a coincidence that the

actual -- the people sitting on the potential jury at this time, that none of the~ happen to be black. I submit that that mere fact doesn't justify enlarging the already large number of peremptory challenges, 12, that have been given to the defense.

THE COURT: Well, I don't know that we have to go through the entire array process, It's the same process that's been used for a long period of time here in Kent County. I recognize that Kalamazoo County has had some problems with that where Mr. Plaszczak is from and so I guess I understand where the challenge comes from.

But the fact of the matter is that if I had seen the motion coming I would have counted for sure out of this number of jurors. I called for 60 jurors, and I thought that's what we had down here. My recollection is that there were two gentlemen and a woman, but I didn't actually count because I didn't foresee the motion. But I do recall seeing two black gentlemen and a black woman in the jury panel.

Well, there's nothing to indicate to me that on that fact alone that the manner of selecting the jurors is anything other than impartial and that there's been any type of Subjective selection of jurors to create a problem
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in terms of representation. Therefore, I'll deny the motion, but it's obviously preserved for the record.

All right. What r would suggest is that I bring the panel back and go through the instructions, wait to swear them until tomorrow morning, tomorrow morning swear them and then start with opening statements. So, hearing no objections to that procedure, I'll call them back in.

MR. PLASZCZAK: I just want to be sure, too, that what we're claiming on a challenge to array is also a violation of my client's constitutional rights and equal protection.

THE COURT: Yea, sir.

(At 4:20 p.m., jury enters courtroom)

THE COURT: Actually I will give them the oath now. If everyone could remain standing--

Now, ladies and gentlemen of the jury, you have been chosen to decide a criminal charge made by the state of Michigan against one of your fellow citizens, and I'm now going to ask you to swear and promise to perform your duty justly and to reach a true verdict. Remember that if your religious beliefs do not permit you to take an oath, you may instead affirm.

So, if everyone could raise their right hand now, do each of you solemnly swear or affirm that in this action now before the Court you will justly decide the questions

STATE OF MICHIGAN
17TH JUDICIAL CIRCUIT COURT (KENT COUNTY)

THE PEOPLE OF THE
STATE OF MICHIGAN
-v- Case No. 92-60735-FH
DIAPOLIS SMITH,
Defendant.
_____/

THE PEOPLE OF THE
STATE OF MICHIGAN
-v- Case No. 93-63788-FH
ROBERT PALMER,
Defendant.
_____/

PROCEEDINGS
BEFORE THE HONORABLE PAUL J. SULLIVAN, CIRCUIT JUDGE and THE HONORABLE DENNIS B. LEIBER, CIRCUIT JUDGE
Grand Rapids, Michigan – February 2, 1998

* * *

[Page 13]
JUDGE SULLIVAN: All right
Good morning. Would you state your name and spell it, please?
MR. FOSTER: Kim Foster, K-i-m, F-o-s-t-e-r.

KIM FOSTER

called by the Defendants at 9:31 a.m., sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LAWRENCE:
Q Now, Mr. Foster, will you state what your position is with respect to the Kent County Circuit Court?
A I'm the Circuit Court Administrator for the 17th Judicial Circuit.
Q And in that capacity, do you have any responsibilities concerning the acquisition of jurors for jury venires?

A Yes.
Q And what are your responsibilities?
A To coordinate the selection with the jury commission, collect the data, the lists, if you will, from the Secretary of State, get those to the appropriate agencies to begin the selection process, see to the mailings out to the juror panels, that sort of thing.
Q All right, and when did you begin in that position?
A December 28th, 1992.
Q Now, you described a Secretary of State list. Can you
[Page 14]
explain what that is and what its role is in selecting jury persons?
A Pursuant to statute, our jury lists come from the driver's license lists and the Michigan identification cards issued by the Secretary of State. So it is their database that we draw our juror names from.
Q Now, once –now, this is a list of who? Who gets on this list?
A If you hold a driver's license or a Michigan State ID, then you're on the list.
Q Okay. Now, do you have the Secretary of State remove any persons from the list as a result of, say, age, being too young or too old? Does the Secretary of State do that?
A The Secretary of State provides us a list of those 18 and older.
Q 18 and older, oh, all right. Now, when that list comes in to your office, what is the next thing that is done?
A Then it is essentially put on the information system across at the Information Technology. It's automated, basically. It comes as a magnetic tape and is put on our--the county system across the street.
Q Okay. Then what is the next step towards providing jurors to the Court?

A The next step is a determination of need is made. Actually, it happens before, but at the time the list
[Page 15]
arrives, the Information Technology Department is given an estimated number of jurors for the upcoming year, and the key number is selected pursuant to statute and the process begins.

Q Okay. Now, the--you have a situation where you determine how many jurors are needed, then I take it you divide that number into the total number of names to receive your key number? Is that how the key number is arrived at?

A I believe, yes, that the number is determined that way. The formula is in the statute.

Q Now, I presume, then, that the result of that process is to have a smaller list of names?

A Yes.

Q And is there a name that's applied to that particular list, the one once you've used the key number system?

A The master list, sometimes referred to as the first list.

Q Okay. Now, can you explain exactly how the key number process is used to reduce it from the Secretary of State list to the master list?

A Okay, With this, at this particular time, the entire list of driver's license holders was requested, so that's 350,000 names, about that, as I understand it. We narrow it down, an estimate of about 50,000 names was needed so you divide the 350,000 by the 50,000, and that determines the, essentially, how you pick, how you go through the
[Page 16]
list, that's every so many names.

Q So, in other words--well, okay, Which name is the first name that would be picked?

A Well, that's the—the first name would start, you come up with a number and you'd count down the list that number, and that would be the first name.
Q So, in other words, if you have the--say that you were the very first person in the alphabet, Aaron Aaron, does this mean that you'd never get picked because the key number would be higher than one?
A No, actually, you do have a random draw of a number between zero and the number that you got from dividing the 50,000 into the 350,000, and that actually is what you count down. So there's a random draw of a number, essentially. Let's say the first number was 20, So you--zero through 20 goes into a hat, draw out a number, that's the first number that is counted down the list.
Q And are you personally the person who does that?
A At that time I was, yes.
Q Okay, Now, this master list is then located, or then prepared, and what is the next thing that happens?
A Qualifying questionnaire is sent out to all the names on that list.
Q And that's done by regular mail?
A May be done by bulk mail, but, yes, through the U.S. Postal
[Page 17]
Service.
Q All right. And is it fair to say that some of the questionnaires are returned and some are not?
A Yes.
Q Okay. Do you know approximately what percentage of the questionnaires are not returned?
A At all? There is those that are considered undeliverable, in other words, they come back and there are no forwarding addresses, that sort of thing, and then there are those where there's just no response, nothing comes back in the mail.
Q Do you know approximately what percentage of the questionnaires are undeliverable?

A. I believe four or five percent.
Q Okay. And do you know approximately what percentage of those that are not returned by the post office as undeliverable, yet there is no response?
A. I believe that's higher, somewhere around 15 to 20 percent.

JUDGE LEIBER: Excuse me, My question, though I understand this deals perhaps first and foremost with Mr. Smith's case, but it's common to the case I am to decide, is whether the witness is speaking of the time period consistently in issue or at some other time. I presume that the witness is speaking about the time that we are to review, namely, the time at which Mr. Palmer
[Page 18]
and Smith were tried.

MR. LAWRENCE: Yes. For the time being, I'd like to request the witness to direct his answers to the time period of the last few months of 1993.

THE WITNESS: I am speaking to the '93-94 jury year, which began in October of '93,

JUDGE LEIBER: Thank you.
BY MR. LAWRENCE:
Q Would your answers be any different regarding the previous term?
A It would, as I wasn't involved in that selection at all,
Q Okay. Now, okay, let's move on to the question of-- okay, you receive back a number of questionnaires and you also receive information that, well, certain people have not responded and that certain of these are undeliverables. What action do you take, if any, regarding the undeliverables?
A At that time, none.
Q And what action did you take at that time regarding the-- those where the post office has not returned it but there's simply been no
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response?

Q Now, with regard to that second letter, do any of those turn out to be undeliverable?

A Generally, I don't recall the exact number from that time period, but we got about a 50 percent return rate from that second letter.

Q All right. Now, with respect to the remaining 50 percent, is any action taken regarding those people?

A A show-cause hearing is set arid brought before, I believe the presiding judge, so an order to show cause goes out, and they are requested to come into court.

MR. McMORROW: Point of clarification. Are we talking about then or now?

THE WITNESS: I don't specifically recall that that happened then, but that's the standard process.

MR. McMORROW: Okay.

BY MR. LAWRENCE:

Q So you're not prepared, then, to tell us whether or not that was done in late 1993.

A I cannot--I did not individually, I guess, participate in that process then, no.

Q Now, if somebody doesn't show up for a show-cause, hearing, are any further actions taken?

A Generally, the judge would order a warrant. However, the law enforcement agencies, as we don't have all the

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information like height, weight, etcetera, refuse to serve any warrants coming out of that hearing.

Q All right. Now, ultimately, there are a certain number of questionnaires returned, and I take it that from those questionnaires, a further list is made of those who have returned questionnaires, is that right?

A Yes, We estimate that we need to send out four questionnaires to get one good juror, so after excuses exemptions and that sort of thing, So the final once exemptions are dealt with, in other words, the people who don't speak and understand English, not residents

of Kent County, that sort of thing, does give us a, another list does result in qualified jurors, we call that.
Q And that would be the qualified juror list?
A Yes.
Q Okay, Now, with respect to these exemptions, who is the person that decides, or that decided during the time, period in question, whether somebody would be exempted or not?
A At that time, it is essentially pursuant to the statute. So you're only qualifying on the few exemptions possible under the jury statute.
Q I guess my question would be, though, who is the person that performs that task?
A Well, essentially, if the juror, potential juror checks one of those boxes, they are considered exempt and signs it
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down below that the above information is true. So I guess they would exempt themselves. In the case of residency, we do ask that they provide us with a new address, and that sort of thing. In case of deceased, we do ask for a date of death. Sometimes we get it, sometimes we don't.
Q Now, with respect to persons with felony convictions, are those people also removed?
A Those people are removed only if they are under a current sentence.
Q All right. Now, if somebody were to return a questionnaire and simply declare that the person had been a juror within the last 12 months, or was not physically or mentally able to be a juror, or even was over 70, would you take any steps to verify that the questionnaire answer was correct, or would you simply accept the answer that the person placed on the questionnaire?
A We do some verification, depending on our resources. If an individual says they are 70, we generally have a birth date to match that with. If the person says

that they served in the last year, we ask for the month, year, and which court, that they provide us that. If they give us mentally unable or that sort of thing, we generally try to get a medical certificate. If we don't get one, we generally take the individual's word.

Q Now, does the Secretary of State list contain any notation

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as to the race of the individual?

A No.

Q And when you excuse individuals, do you keep any record of the race of the individuals being excused?

A Exempting, or --

Q Exempting, I'm sorry, exempting.

A No, we have no way of knowing.

Q All right. Now, once you -- and the qualified juror list, I presume, also does not have any record of the race of the individual, is that right?

A That's correct.

Q All right. Now, the qualified juror list is now made, and what is the next thing that you do?

A The next process is to select the jurors for the individual courts, so based on the need for Circuit Court, it would be, as I recall, it was roughly 12,000 jurors would have been randomly selected in a similar process, depending on how randomly the total list was, and how many--so, in other words, if the list was, say, 30,000, 12,000 would have been pulled out to develop the Circuit Court list.

Q Okay. Then at some point--okay, when you say randomly selected, could you tell us--

A Similar to what we did with the earlier process. It would have been 12,000 divided into the total number, and so every so many names would have gone into the – until

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12,000 was met.

Q Then I presume at some point jurors are sent notices to appear for jury service?
A Yes.
Q From that reduced list--and what do you call that reduced list?
A That's the second list.
Q That would be called the second list?
A The second list would be the jurors we would use throughout the year. That would be the panel that we would summons from for each month.
Q Now, at some point a questionnaire, or, rather, a notice goes out to tile people on the second list advising them to report to court for a particular case.
A Yes.
Q Okay. And can you ten us approximately how long is the period of time from the time you first send a questionnaire to somebody until the time that person appears in a courtroom to serve as a juror?
A Generally, six to eight weeks.
Q Okay. Now--

JUDGE LEIBER: Excuse me. I'm confused. When you said questionnaire, do you mean when you send material to the particular juror to create the first list, or the second list?
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THE WITNESS, No, we're in the second list now. So when an individual is summonsed, a personal history questionnaire goes with that summons.

JUDGE LEIBER: Thank you.

JUDGE SULLIVAN: And six to eight weeks after what again?

THE WITNESS: Six to eight weeks before they are to appear.

JUDGE SULLIVAN: Oh, before they are to appear.

THE WITNESS: Yes.

JUDGE SULLIVAN: Did I understand the question differently, though? How soon--when that list

goes out with the jury, juror questionnaire and all that, how far after the original list you get from the Secretary of State, how much time we talking about there?

THE WITNESS: The list generally is prepared over the summer, so it's May through August. And the panel is actually selected beginning in October. So the names we're collecting and exempting and the lists we're developing are for jurors to begin service in October of that year.

JUDGE SULLIVAN: So, generally, people are actually going to be called in somewhere between three months and 12 months.

THE WITNESS: After they are qualified, yes.

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BY MR. LAWRENCE:

Q All right. Now, suppose that an individual returns a questionnaire and is qualified, but during the course of the time period before they are called to court, the person moves within Kent County, possibly to another census tract within Kent County. What happens in the case of a person like that?

A Essentially, nothing. The name on the summons would --determines ownership, if you will. So if we got -- if we summons someone, came back either as no longer at this address but forwarded, we would send it back out. Generally what happens is it gets to the individual they change their address on the form, indicate a new address, and that is what is entered in the computer. So the individual is still considered a juror, with a different address.

Q Now, are any of those notices to appear that are sent to jurors, are any of those undeliverable?

A I'm sure that's the case, although I -- that is not something I've looked at, as to counting and that sort of thing.

Q Okay. In the case of undeliverable, from that notice to appear, are any steps taken?

A If it comes back as undeliverable, we would not, pursue it at that time

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Q Okay. Now, a time comes when a court case is to start and jurors are to appear. What happens if somebody who has been mailed a notice to appear as a juror fails to show up at court?

A Again, a show-well, if they don't respond at all, we would attempt to contact them to find out what the problem is. If it's just a pure "I'm not gonna do it," get a very hostile response, then we would show cause that individual in in front of the presiding judge.

Q So each and every person who fails to show up, you're saying that somebody from your office tries to contact that person by telephone?

A We make an attempt. I can't say we're always 100 percent successful, but we're certainly in the high nineties in finding out about each juror.

Q And is that an estimate; or is that based on actual statistics kept by your office?

A That's an estimate for this year.

Q All right, and what about in 1993, the last half – the last few months' of 1993?

A Well, from October to December, that would have been the case.

Q All right.

A An attempt is made.

Q What if the individual doesn't have a telephone or the

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telephone is out of service?

A It's generally correspondence.

Q Do you send police officers out to the homes of these people who don't show up?

A We do not.

Q Okay. You simply send a letter?

A Yes.

Q Okay.

A or make telephone--
Q Or try to make telephone contact?
A Yes.
Q And if the person doesn't answer the letter or can't be reached by telephone, what steps are taken?
A If it does not come back as an undeliverable letter, we would issue an order to show cause and ask the individual to come into court, and then it would be up to the presiding judge as to what steps we're taking. Generally, again, it would be the same sort of thing. If we did issue a warrant for contempt, we're in the same position that we would be with the larger list.
Q Now, during the last few months of 1993; would jurors for District Courts in Kent County also be taken off of the qualified juror list?
A Yes.
Q Okay. And would they be selected first, before you select
[Page 28]
Circuit Court jurors, or after you select Circuit Court jurors?
A No, that year they were second. They were after we selected Circuit Court jurors.
Q So you're saying beginning October 1st of '93, you began selecting Circuit Court first, then District Court.
A Yes.
Q But before that date, it was District Court first, then Circuit Court, is that correct?
A Not having been a part of that process as far as selecting the jurors, my understanding is that is what occurred, but I wasn't there.
Q Well, you indicated that your starting date was December 28th of 1992. Can you explain why you would have no real familiarity with what happened before October 1st of '93?
A The master list would have been selected in May, and June of 1992 and developed the summer prior. And that panel--I would have dealt with the monthly excuses;

however; I would not have dealt with the actual selection list. All the panels went out to the District Courts, the Circuit Court panel list for the year was selected by the time I arrived in December.

Q Now, does it ever happen that individuals attempt to not be required to serve on a jury by virtue of giving non-statutory excuses, such as "I can't get a ride," "I

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can't afford to take off work," "I can't get a babysitter," things of that nature?

A Yes.

Q And when people make those requests, where do they go? Who determines whether that's a good enough excuse?

A The Circuit Court Administrator, in cooperation with the chief judge, depending on, say, if it's a--if I've dealt with a situation, or my predecessor, and the individual wants further consideration, it would go to the chief judge of the Circuit Court. But for most parts, the monthly requests for excuses would come to the Circuit Court Administrator, or me.

Q Okay. Now, are--can you tell us whether any changes were made in the jury selection process beginning October 1st, '93, that would distinguish it from the practices that took place before that date?

A Yes.

Q And what would that be?

A Two things, specifically, is a request was made to the Secretary of State for the entire driver's license list. The statute does allow a narrowed list, in other words, the Secretary of State would--we told them we needed 50,000 jurors, they would send you a list with 50,000 names on it instead of the entire list. So there is an option, when you request of the Secretary of State, to request the

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entire list, in other-words, all driver's license holders and Michigan ID holders in the county, or a narrowed list. So they would do the first draw, if you asked them to.

We went that year, starting, for the October 1, 1993 panel, we went-to requesting the entire list for the initial selection, and then we drew the Circuit Court jurors first that year.

Q Okay. Now, can yon tell us, what was the purpose behind requesting the entire list rather than the abbreviated 50,000 name list?

A We believed it would give us a larger selection, a larger representation of the community to select from.

Q Okay. And was this because your office perceived any problems with respect to the amount of minority representation on jury panels?

A It was a problem that had been identified prior to my arrival.

Q Okay. Now, with respect to picking circuit jurors first rather than the procedure before, picking district jurors first, why was that change made?

A The belief was that the respective districts essentially swallowed up most of the minority jurors, and Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just--it represented certain portions of the county.

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Q All right. Now, one of the criterion for disqualifying a person, for exempting a person for jury service, is whether they have been a juror within the last 12 months, is that correct?

A That's correct.

Q So if there had been a disproportionate effect on minorities being on these District Court juries before October 1st, could that have a lingering effect for the following 12 months?

A I'm not--could you re-ask that question? I'm not sure what you're --

Q Okay. Well, suppose that, for example, minority individuals are called on to District Court jurors-- juries in proportionately high numbers; then for the remaining 12 --for the following 12 months they would not be eligible to be circuit jurors, is that correct?

A That's correct.

Q Okay. Now, the original order for discovery that involved requested certain jury records covered the period of July 1st, '93, to June 30th of '94. I understand that the records that you provide don't exactly match that time frame. Please explain the time frame of the records that you provided and why the change was made.

A I believe the October of '94 --

Q I believe we're talking 1993.

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A '93. One of the months was missing, and I believe it was either October of '93 or October of '94. So as a result, we went back a few months earlier.

Q Were you able to provide any records from before October 1st of '93?

A I believe we did, yes. We have them. Lists.

Q Okay. Now—

A It was .pointed out to the investigators that our understanding was the initial request was October 1 of '93 to October 1 of '94, and the records prior to that would have been a different panel.

Q Well, if in fact the discovery order stated July 1st of '93 to June 30th of '94--okay, well, at this .point, I guess I'd just like to state to the Court that it can take judicial notice of its own records, that in fact the order did state that, and I'd like to ask the witness, did you in fact have records between July 1st of '93 and October 1st of '93, that were not submitted?

A Well, first of all, I'd like to state I never received a written order. My understanding of my request for information came verbally over the telephone from the SADO attorneys and SADO investigators. I had

continually requested correspondence and did not receive it, as to what specifically they were looking for, and my understanding of earlier records were only requested upon learning that we

* * *

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of those to every address with an unreturned questionnaire?
A Yes.
Q And that was to every single address where the questionnaire wasn't returned?
A Yes.
Q In the jurors who were on the list for the '92-93 term, would there ever be instances where those jurors would be carried over to the '93-94 term?
A There are provisions for deferral of service for one reason or another. Let's say they are originally summonsed for, in this case, say September of '93. If that was—they were on vacation all month or something and said "'I'd like to serve, but I just can't do it that time period," then we would defer them, say, to a following time period.
Q And would there also be a case from year to year where you'd have too many jurors, you'd have qualified jurors from one year who would then carry over to the next year?
A No, not in circuit. We start fresh each year.
Q In the course of your job, I take it you have had an opportunity to observe the pools of prospective jurors that are called to serve on Kent County Circuit Court. Do you actually see them or talk to them?
A Yes.
Q Okay. And was that also true for the time period of '93 and '94?
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A I was doing less of it then. Beginning of October, I participated in the, in the orientations.

Q Could you summarize your observations for that general time period with respect to the number of black people who appeared on the jury arrays?
A The visible minority jurors seemed low.
Q What do you mean by low?
A For a county the size of Kent County, we generally bad maybe six, seven visible minorities in the large panels that were in for the evening.
Q Now, there was the switch from the '92-93 term to the '93-94 term, where your '93-94 term was the first time you were pulling the Circuit Court juries --
JUDGE LEIBER, .Slow down, please.
BY MS. YATES'
Q In '93-94, you first began to pull the Circuit Court jurors first?
A Yes.
Q Right? At that time, did you consult with any jury experts or any minority groups with respect to that change or other possible changes?
A Well, We were working with the Grand Rapids Bar Association, had an active committee at that point, working in conjunction with the City High people. So we were using those individuals and their experience as our experts, if
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you will.
MS. YATES, Can I just have one minute? (pause) I have no further questions.
MR. LAWRENCE: With the Court's-
JUDGE LEIBER: Just a--I have a question.
Mr. Foster, you say that, if I understand correctly, since the time can get away with us in terms of time frame, you began to view the composition of potential jury panels in October of '90 •.
THE WITNESS, Four. I'm sorry, that would have been October of '93, yes. That's when I became active with the orientation process.

JUDGE LEIBER: And in October of '93, were these potential jurors people who had passed through a process that you had supervised?

THE WITNESS: Yes.

JUDGE LEIBER: Because the first master list or first request of the expanded list from the Secretary of State was by you in October of '93?

THE WITNESS: The actual request would have been the previous May, April, May.

JUDGE LEIBER: Previous May. So that the people that you saw in October of '93 came from that requested expanded list?

THE WITNESS: Yes.

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JUDGE SULLIVAN: But the people in September did not?

THE WITNESS: Correct.

JUDGE SULLIVAN: And with respect to the September, for a jury picked in September of 1993, that would have been under the old system?

THE WITNESS: Yes.

JUDGE SULLIVAN: And was your answer that under the old system, and what would have applied to September of 1993, that District Court jurors were chosen first out of that group, or that you simply don't know the answer?

THE WITNESS: That is my understanding of what occurred that year, but I did not actually participate, so I don't know for sure.

JUDGE SULLIVAN: Okay.

Mr. McMorrow, did you have --

MR. LAWRENCE, With the Court's permission, I do have a couple more questions I'd like to ask before the cross-examination so the cross-exanimation could all be done at once.

MR. MCMORROW: That's fine, no objection.

DIRECT EXAMINATION

BY MR. LAWRENCE:

Q Just very quickly. We've submitted documents to the court, statistics indicating that black citizens are convicted of felonies proportionately more than white citizens, and I am

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wondering if, after excusing those who are under sentence for felony, you took any steps to correct any under-representation of minorities that the not under sentence but for felony rule might impose? Did you take any corrective efforts to say go out and find more minorities to compensate for those who had been excused for being under sentence for felonies?

A During each month, no.

Q No. And if it turned out, from one of our subsequent experts, that members of minority groups are less likely to have a car, more likely to be unmarried mothers who can't find babysitters, ,and if that had an effect on the number of minorities that came into the pool, would you take any steps to add minorities to the pool to take into account those excused because of the various excuses like no car, no ride, no babysitter?

A I have no way of determining a race at the time those are being dealt with, as far as excuse for transportation, but answer your question, is now once the month---those excuses are dealt with once an individual is summonsed to jury duty for a given month. Generally, no further action is taken dealing with an excuse. We plan on, in requesting the numbers, or number of summonses for a month, that there will be some of those requests for excuse, So we always request enough people to be there.

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MR. LAWRENCE: Thank you. No further questions.

JUDGE SULLIVAN: Mr. McMorrow?

CROSS-EXAMINATION

BY MR. MCMORROW:

Q Mr. Foster, you testified that the Secretary of State provides a list of those who are 18 or older?
A Yes.
Q That would also be under the age of 70, is that correct, as well?'
A I don't believe there's an upper limit, because we do deal with exemptions over 70.
Q I see. So the list you would get would include people over 70, but they could get an exemption automatically by claiming it?
A If they claimed it. They need to request not to serve for jury duty if they are over 70. It's not an automatic. They need to tell us that they don't want to be a juror.
Q You've made a comment about the statute.
A Yes.
Q What statute are you talking about?
A Michigan--I can't quote you the number, but there is a statute that governs the jury selection process.
Q I'm looking at a Revised Judicature Act Statute starting at 600.1300, going on Chapter 13 on jurors. Is that what you're talking about?
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A Yes.
Q Are you familiar with that statute?
A Pretty much, yeah.
Q And your understanding is that you follow that statute?
A Yes.
Q You said that, you said that 50,000 names were needed, you made a comment about that, and I assume, and correct me if I'm wrong, but you were saying there might be 50,000 initial questionnaires sent out in a particular year?
A To qualify, yes.
Q Qualifying questionnaires?
A Mm-hmm.

Q Would that be a fair estimate? I know I can't hold you to a number, but there would be 50,000 sent out?
A Usually it's--I can't say it's exactly 50,000, but it's certainly around there. Again, is based on the need, projected need for any given year. I think the following year we estimated about 40,000.
Q Okay. Now, you would have--how many jurors would end up serving, would be called for Circuit Court jury duty in the course of the year?
A How many?
Q Yes.
A Anywhere from, we would summons probably three to 5,000.
Q If you would summon three to 5,000, then why do you send
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out 50,000 questionnaires?
A 50,000 isn't for just circuit, it's for all the courts in Kent County. So that's to cover all the needs of all the courts in this county. We do estimate, as I mentioned earlier, that we have to send out roughly four summonses to get one good juror. In other words, you know, through the qualifying and excusal, and of the various other reasons, that's been our estimate.
Q Now, the jurors lists that you get, there's no identifying feature in terms of race, is that correct?
A Correct.
Q There's no identifying feature in terms of race on the list of the Secretary of State's list that you get?
A Correct.
Q And that's a combination of driver's license and personal identification cards?
A Correct.
Q So we don't use voter registration anymore?
A No.
Q Okay. Is this provided--is there given any provision in terms of the lists that you get of census

tract—first of all, do you know what I mean when I say census tract?

A Yes, I do.

Q Is there any listing of census tract on the names that you get from the Secretary of State?

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A No.

Q Do you use census tract in sending out the initial questionnaires?

A No.

Q Now--

JUDGE LEIBER: Could you tell us what you mean by census tract, just so at least I know and the witness and the prosecutor know we're talking about the same thing?

MR. MCMORROW: I think what they are talking about there, your Honor, is that in every area, the United States Census develops a tract, and there's something like 110 maybe or so in Kent County. And so you see, for example, in one of the exhibits we gave, the City of Grand Rapids, census tracts, and it gives numbers. Typically, they are by number, Number 1, Number 20, Number 126, sometimes they are 126.01 or 118.01.

But what they are, are geographic areas in which they try, they roughly even out the amount of people in any particular area.

JUDGE LEIBER: Is that your understanding. Mr. Foster?

THE WITNESS: Yes.

JUDGE LEIBER: Okay, thank you.

BY MR. MCMORROW:

Q Now, I want to follow up with regard to the undeliverable

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questionnaires. I think you have have said this, but did you say what percentage that you could estimate of the

questionnaires that were sent out that - in 1993-94 year, were undeliverable, completely undeliverable?
A I believe it was four to five percent.
Q Is it still that figure?
A It's been pretty constant, as I recall.
Q And you referenced the study that was done, which I think is the City High study?
A Yes.
Q What would you do different now in terms 'of questionnaires that were undeliverable in terms of--I think you said this; but I want to clarify. What would you do that's different now?
A Now, today?
Q Yes.
A What am I--
Q Well-was there, as a result of the study--there was something -- I think you testified this, but I want to clarify it. Was there something done as a result of the City High study in terms of how you dealt with undeliverable questionnaires?
A Yes.
Q And that was--
A To re-issue them back into the same area of the community.
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Q Okay. In the past when you had an undeliverable questionnaire, what would you have, done back in '93-94?
A Nothing. Came back that it was.
Q Just came hack. So you sent out 50,000 questionnaires, you may get 40,000 back?
A Yes.
Q But now if you send out it questionnaire, or at least at the time, '93--not '93-94, but after that, as a result of the subsequent City High study, you would have sent another questionnaire back into that same area?
A Yes.

Q Okay. You also said something else here. You said that when questionnaires are sent you- and they are not returned as undeliverable, but instead they are returned, they are simply not answered?
A Not responded, yes.
Q You'd send a second letter out?
A Yes.
Q And I think you testified that you, got about a 50 percent return on those?
A From the second letter, correct
Q Second letter. Is it fair to say here that that's your estimate, that you don't have kept statistics on that, that's an observation or estimate or have you kept statistics?
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A We do have statistics on that, I believe it's around the 50 percent level.
Q Now, you said for the other 50 percent a show-cause hearing would be set?
A Yes.
Q Do you know what percentage of those people would-show up for a show-cause hearing?
A I do not.
Q You also said something I want to follow up on as well, you said if someone doesn't show up the judge would order a bench warrant for that-person?
A May, yes.
Q But that law-enforcement would not serve the warrants?
A That's correct. We go to the point of preparing the warrant, but we do not have the-personal information available to us that law enforcement agencies- would need to serve the warrant. So they have indicated to us that hey will not serve any of those types of warrants.
Q What kind of personal information would you not have?
A Height, weight, scars, general information-that's collected with a criminal complaint.

Q Would that also include race?
A Yes, if available.
Q You would not have that information in terms of those--
A Correct.

* * *

[Page 65] [intentional skip in pages]

MR. MCMORROW: I'll prepare a list and stipulate to the number. We can get it from the bar journal.

MR. LAWRENCE: Okay. I guess I have no further questions, thank you.

DIRECT EXAMINATION

BY MS. YATES:

Q Just one quick question. When did the change from the jury commissioners looking over the questionnaires to the court administrator solely, when did that occur?
A Just this past year.
Q In the '96-97 term?
A I believe so.
Q Okay, so this is the first year that only the court administrator does it?
A Right.

MS. YATES: Okay.

MR. McMORROW: I have no questions.

JUDGE SULLIVAN: Well, thank you very much, Miss Orlikowski.

Did you have any questions, Judge Leiber?

JUDGE LEIBER: No, I have none.

MR. LAWRENCE: At this time we'd like to call Michael Stoline.

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MICHAEL R. STOLINE

called by the Defendants at 11:17 a.m., sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LAWRENCE:

Q Now, you are Dr. Stoline, is that correct?
A That's correct.
Q And can you tell us where you're presently employed?
A I am employed in the Department of Mathematics and Statistics at Western Michigan University in Kalamazoo.
Q And what is your position there?
A I am a professor of mathematics and statistics.
Q Could you give us a brief rundown of your professional qualifications?
A I earned my doctorate at the University of Iowa in 1967. I have just finished 30 years of service at Western Michigan University. Early on at Western, I served as a statistical consultant for the entire university for, oh, 15 or 20 years, and then after that, I have simply focused on problems dealing with the environment, the medical and pharmaceutical area.

Our business at Western, at least in our department, is to prepare students for careers in--as professional statisticians, and most of our graduates go into the medical-pharmaceutical area, so that's the area that I

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specialize in.

I also have an outside statistical consulting firm called Stoline Associates, and I do quite a bit of work with corporate clients.

MR. LAWRENCE: I would like to propose that the witness be qualified as an expert in the field of mathematics.

MR. MCMORROW: No objection.

MS. YATES: I concur.

JUDGE SULLIVAN: As far as I'm concerned, that's approved.

JUDGE LEIBER: Concerning Defendant Palmer, the witness may be qualified to give his opinions within his area of expertise and training.

MR. LAWRENCE: Thank you.
BY MR. LAWRENCE:
Q Now, can you explain how it is that you first got involved with this case?
A Linda Boros of the Michigan Appellate Defender's Office called me last fall and briefly described the nature of a problem that they wanted to look at here in Kent County, so that's how I first got involved with this particular project.
Q Okay. Now, were you provided with any statistics, figures, or reports?
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A I was. I was provided with the--a breakdown of the jury list of 2,252 names that--in the time period that we're talking about here, which was October 1993 to October of 1994. And then a second list that was provided was a list of some of the data obtained from the 1990 census of Kent County.
JUDGE LEIBER: Let me -- give me a moment here, please. (pause) Thank you.
BY MR. LAWRENCE: , .,
Q Now, I would like to show you copies of what are Exhibits E and F in this case, and ask if these were some of the materials that you were provided?
A This, yes.
Q Referring to Exhibit F?
A Yes.
Q You recall this exhibit -- E?
A E. I don't remember seeing this one. I do--Exhibit F, yes.
Q Okay. And you received other information that was not presently --
A Let me amend this. I was sent a floppy disc that may have contained that other. I only used the F. I did not use the other. I think I was sent all of that, but I simply focused on what you showed me in Appendix F, in my analysis.
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Q Now did you make any examinations and computations with respect to determining the minority population in various census .tracts?

A I did. I first examined the characteristics of the jury list comprised of 2,252 names and compared that composition to the composition that was given to me of the 112 census tracts that comprise the 1990 Kent County census. That was my first step. And then after that, after I made that examination, essentially I wanted to see, first of all, whether there were certain census tracts in that Kent County—whether there were certain over-representation or under-representation, or what you might call bias, are there certain census tracts that were over-represented on that jury list of 2,252 compared to what you would expect from the 1990 census.

And then if there was bias, meaning that there were too many on that list or too few, then to try to determine if there were too few or too many and then go back and see if in fact there was a relationship between the bias, which would be too many or too few, as it related to then the composition of those census tracts as to the proportion of black residents that would be in those districts. That's what I did, and I'm sorry this takes so long to describe, but it takes a few words to describe what was done.

Q Okay. Now, your report has been admitted as Exhibit G and

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there are some tables that are attached to it that are part of the report. Did you compute those tables yourself?

A Yes, I did.

Q Okay. Now--

A Let's put it this --I used a computer package to do this, which is a computer package called SAS.

JUDGE LEIBER: Called what, please?

THE WITNESS: Called SAS.

JUDGE LEIBER, Spell it.

THE WITNESS: S-A-S, it's the most widely-used computer package in the pharmaceutical industry, so that's the one I used, because that's what we use to train our students.

BY MR. LAWRENCE:

Q And through using this computer program, you personally supervise the operation of the program so as to determine that the results were, to your mind, correct?

A I did the computer programming for this, yes.

Q All right. Now, can you tell us whet conclusions that you drew regarding under-representation, over-representation, or neither deviation, with respect of the census tracts in Kent County?

A To begin with, there were two major results. The first result is that there are many more census tracts that are either over-represented or under-represented on the lists

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of 2,252 jurors when compared to what you would expect from the 1990 census. That's number one fact. The second is that when I tried to associate, by doing a further analysis, it turns out that, for example that the – I would estimate, using the techniques that I used, that there is an under-representation of blacks by a fraction, or a percentage, rather, of 15 percent.

And that I also did a further -- this is overall; And that furthermore, if I did an analysis, I think on the last table, that does this term by term. Now, term is the way this was done, as was explained previously, the selections were done in a four-week period. So there are 11 four-week periods that are summarized here, so the list of 2,252 was obtained by adding together the numbers--the numbers were obtained by adding together the number of jurors that were formed or obtained or selected or that ended upon the jury list in the first four-

week period, which is called term one, then the second, and so on, through term 11.

And when you do an analysis term by term, it turns out that there is an under-representation of blacks that show up in this analysis in ten of the 11 terms, and that's when you try to estimate the size of this, that two of those terms show, at least with the analysis that I have done, that you would expect there to be an under-representation by as much as 40 percent, or exceeding 40 percent, for two

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of those ten terms, where blacks are under-represented. Those are just using techniques of estimation.

Q Okay. Now, yon divided the census tracts into three categories, depending on the number of black residents in the tract, is that right?

A I did that, yes. The 112 census tracts, each, the information contained on the census contained--that was given to me--the census data-it gave to me the numbers of black residents, the number of white residents, and the number of actual others that comprise that census tract. So from that, you can determine the percentage of each of those census tracts, each 112, what percentage of black residents there are. And I really chose to then divide the 112 census tracts into three divisions. One was the – I think there are 35 census tracts that have -- that are comprised of more than five percent black residents. And then there's another middle proportion that have a proportion of black residents in the census tracts of .5 percent to five percent, and then there are other – the third category would be those census tracts that have fewer than .5 percent black population, so they are predominantly non-black.

Q Now, with respect to the category of census tracts with the highest level of black population, did you find any case where such a tract was over-represented statistically on

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the jury list?

A I did not. There were, I believe, 35 census tracts that have--that are in Kent County that, according to the 1990 population of--now, these are populations of residents that are aged 18 years or older, but then exclude those that are 70 years or older, so it's those that are aged 18 to 69. So I think there are 35 tracts in there that have at least five percent--there are 35 census tracts within Kent County in 1990 that have five percent or more of their 18-year-old to 69-year-old group comprised of blacks.

And in that group, I believe there were 12 that showed some bias with respect to either there's too many jurors selected from that list, that's on this list of 2,252, or not enough. And in those 12 cases, all 12, the case was not over-representation, it was under-representation in all those 12 cases, which is noted on page 8 of my report.

Q Now, speaking now of those tracts in the category with the lowest percentage of black residents, and referring specifically, I believe there's a table on page 10 of your report, can you tell us what your conclusions were about whether that group, the group with a low percentage of blacks, were being over or under-represented?

A Okay, there were 34 census tracts all together that really have what you would call a small fraction of black residents. Small, I've defined that to mean, in my report,

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of .5 percent black residents or smaller. So there are, according to the 1990 census, and there are 34 of those. It turns out that there are 18 of those 34 census tracts where there's a bias, meaning that either there's too many residents that are selected on that list of 2,252, or not enough.

So then when you look at the cause of why there's a bias, it turns out that in 13 of those 18 cases, they are over-represented, meaning that there are more people

selected from those census tracts that have very small proportions of black residents than what you would expect. And of those 18, 13 are over represented, meaning there's a larger number than you would expect selected on that list of 2,252 jury list that was selected, and there are five of those 18 that were under-represented.

But that 13—you know, you would assume that if there's bias, meaning if I tell you that there are 18 cases where there's a bias number of people from, say, there are 18 census tracts where there's either a disproportionately large, or disproportionately small number of people being selected to serve on, say, the list of 2,252, you would expect everything else being equal, that half of those would be over-represented and half would be under, But in this case, there are 13 out of the 18 that are, of these, that are over-represented and five of the 18 that are

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under-represented.

And I believe that is -- I don't have numbers in here to say whether that's statistically significant, but it is.

Q Now, just to make it clear, when you're referring to bias, .you're not referring to the attitudes of individuals; but, rather, to a statistical disparity, is that right?

A That's right. The bias is just something that you observe that is not what you would expect if all principles of random sampling were going on here. So we're just saying something is different. Now, so that's bias. Then we're trying to characterize the bias in the sense, is that census tract then over-represented on the list, or under-represented, or is it--the other possibility would be that the numbers that come from that census tract are consistent with what you would expect according to random sampling.

And actually, 69 of the 112 census tracts, that's true, at least what I found. And that in the others, that there's some bias, and so I've tried to characterize that bias, is that census tract over-represented or under-represented, and then is the over-representation, is it somehow associated with the proportion of black residents in those districts, or, I'm sorry, in those census tracts, or not.

Q Now, in the 12 census tracts that were biased, where there

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was a high proportion of black residents, you found that in two cares the under-representation was as much as 40 percent?

A That's a different issue. The issue that you just described there is really putting a focus on the 11 terms that we divide the list of 2,252 into 11 distinct samplings, the first month, the second, and so on, through not the 12th but the 11th, that's all we have, Here arc thc results of 11 terms.

But what I did and did not put into this report was, I did some type of an analysis of each of those terms separately. If I had put all of those results in that I have, it would be a massive report. But I tried to summarize same of these findings as to what was the effect of this bias, or try to estimate the bias, the under-representation or over-representation,-within each of the individual terms that comprise the whole list of 2,252.

Q So the 40 percent figure that you gave would refer to what exactly?

A Well, it's on Table 4, and what we have in Table 4 is, essentially, if random sampling had occurred, we would, expect, in this list of 2,252 names that comprise the jury, list, we would expect about 164 of those names to be black residents, because the population is about 7.28 percent black residents on that list –the 1990 census list that

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was given to me. So using, just multiplying .0728 times the number that's in that, on that jury list, the 2,252, you get 164.

Now, using--because of the fact that we observed that there's relatively more jury--jurors being selected from those census tracts that have relatively more whites, and because we're observing that there are relatively fewer jurors being seated from those census tracts that have relatively more blacks, it turns out that using techniques of estimation here; you can actually estimate that the actual number of black residents that we would estimate to be part of this list of 2,252 is only 139. But we would expect 164 with random sampling, and--if everything were going according to--if the list that we were sampling from was identical or very, very similar to the 1990 census data for Kent County.

I was able, then, by the same technique that I was able to use to show that that list of 2,252, that we, because of the under-representation and over-representation that's associated with those census tracts that have relatively more blacks and those that have relatively fewer-blacks, that same technique that I could use for the whole list of 2,252, I could use that same technique, term by term, and so that's how there that we show that, for example; for Term 3, we would expect 18
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black residents to' be on the list, to have been selected. But because of the way that the juries were constituted in that Term 3, because I know which census tracts they are coming from, okay, we would expect ten blacks, only ten blacks to be on that list, which is quite an under-representation, We'd expect 17-and-a-half if it were fair, or random, and we would only expect, by using what I observed to be the composition of the juries that were put together in that Term 3, we would only expect ten blacks on that list. And the same thing is true-- and

that's 41.1 percent under-representation on blacks on that list.

A second one is Term 5, We would expect 15.4 blacks on that list, if it is kind of a mate to the 1990 U.S. census, But because of the way that the -because I know the numbers that were selected in Term 5 from census tract 1,2, and so on through 112, we would only expect about 8.7. So 8.7 is more than 40 percent away from – under 15.4,

Q Now, is it fair to say that you used the census tract analysis of race because you didn't have actual data on the race of each individual juror?

A I know nothing about the composition of this – of that list of 2,252 with respect to race.

Q But you feel that its reasonable – well, do you feel that

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it's reasonable to infer the race of the individuals when you're talking about these quantities by determining what census tracts they come from?

A Could you rephrase that?

Q Okay. Do you feel that it is possible for you to reach statistical conclusions regarding the racial makeup of what's to be expected and what actually happened by virtue of knowing the census tract figures?

A I can make calculations about the expected composition, assuming that the lists that are used and the technique that's used in getting your list of 2,252 for this jury list, assuming that that mirrors the makeup of the—two things. One is that the distribution of the 2,252 jurors that are actually selected, that that distribution is similar in composition and proportions to the composition that they come in a representative way from the 112 census tracts, okay, that comprise Kent County.

And, number two, that within each of those census tracts, that the racial expectation, if a census tract has five percent blacks and 95 percent non-blacks, that if you have 20 people being selected from that census tract:

okay, that are on the jury list, you'd expect five percent of those people to be black, so that would be five percent of 20 are one, you'd expect one black on that list And that's exactly the technique that you use.

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Q Okay. Now, is it fair to say that with respect to under-representation of blacks; that the amount varied significantly from month to month or term to term?

A I didn't run an analysis of that, and I, I think I would characterize it as follows: There were 11 separate monthly, or four-week periods that were pooled together., four consecutive or – yeah, four consecutive weeks and then those 11 four-week periods were pooled together: What I saw was that ten of these 11 terms, ten of these 11 separate lists, showed statistical evidence of the possibility of under-representation of blacks. It turned out that there would be an over-representation; actually, the first one.

So you talk about the consistent theme. There was a consistency that in ten of the 11 terms, there was evidence of the estimate would be that blacks would' be under-represented in ten of those 11 terms. And what surprised me a little was that in a couple -- well, in – I drew attention to two of those terms where the under-representation was what I considered to be largest and in this case it was -- you could characterize it as being over 40 percent.

But I would have to do a separate statistical analysis to actually answer your question whether there's a consistency or homogeneity of these under-representations.

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I don't want to look at the numbers and just give you my opinion about that. That's a statistical question that you have asked, and I would want to do my homework on it and come back and give you a thoughtful answer.

Q Now, with respect to the under-representations that you did find: did you reach any conclusions as to

whether that could strictly have been as a result of chance?

A Yes. I--first of all, there's two areas in here where that question could be addressed. The first is this. That I found many -- in the 112 census tracts, when you look at those individual, census tracts, I found statistical, strong statistical evidence to indicate that there was bias, overall bias in the numbers that were, that were in the list of 2,252 jury names, bias with respect to either an over-representation or a possible under-representation of just people, without characterizing whether they are black or white, just people, on those jury lists.

That's the first conclusion, okay, because, for example, you would expect 25 percent of them to be biased, which would be 28, but I actually found 43, okay, there were 43 census tracts where there's just either too many people or too few, okay?

Then when you began saying, okay, let's try to determine whether the too many or too few then is associated with the second conclusion, so the answer is

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yes, there's statistical evidence that there are too many census tracts that either have too many or too few on that list of 2,252, according to what you would expect if you were to compare that purely to the census tract or the census data from 1990, of the 18-year-olds to 69-year-old group that we're looking at.

Q And with respect to those census tracts that you identified as having a high percentage population of blacks, you found, did you not, that every single time that there was a deviation from the norm, it was a deviation towards under-representation, is that correct?

A In the census tracts that --in the roughly one-third, or 35 of the 112, there were 35 census tracts out of the 112 that have more than five percent black minority. So in those 12, of the 35 census tracts in there where there is a problem, where there is either too many or too few members, or either too many or too few jurors, it

always turned out that there were, in those cases, too few. An under-representation of jurors.

Now, again, we don't know whether .- I mean, because it's, because these are the districts, then, or the census tracts that have the highest proportion of black residents, then it allows one to go ahead and try to estimate the size of that. Yes.

JUDGE LEIBER: May I ask a question? Perhaps you'll

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get to it. If you will, then I'll let you ask the question, but as I understand, the witness, through his research, has identified three categories. I don't believe we've had any testimony about that category for which the estimate is between .5 and five percent of black population. Where will I find that?

THE WITNESS: Yes. There are 43 census tracts that are characterized as having, according, again; to the 1990 census, either --well, a range of black residents either from .5 percent to five percent. .So it would be kind of the medium group, and we have not talked at all about that.

What I am seeing in here --to tell you the truth, I didn't analyze that a whole lot. What we're seeing here is that, first of all, there are 13 of those 43 census tracts that show either over-representation or under-representation. And five of those 13 are over-represented, and eight are under-represented; And if you ask the question, and I don't have this in my report, but is that, again, according to principles of random sampling, you would expect maybe, you know; the five and the eight, you would expect those to be about the same if there was an even chance that it's under-represented or over-represented, okay? And those numbers that we're seeing there, the five over-represented, and the eight

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census tracts that are under-represented, those don't differ statistically, but I do not have that in this report. They are non-significant.

JUDGE LEIBER: Five were over-represented?

THE WITNESS: This is on Table 3 on page 10.

JUDGE LEIBER: Okay.

THE WITNESS: And--

JUDGE LEIBER: Let me ask you again, so that I understand--

THE WITNESS: There are 43 census tracts.

JUDGE LEIBER: 13 had bias?

THE WITNESS: 13 had bias. Then when we try to characterize the bias, you know, are there too many people being selected or too few people being selected from those 13, the answer is too many, or--in eight of those—I'm sorry, in five of those, they are over-represented, and too few in eight of those 13.

JUDGE LEIBER: Thank you.

THE WITNESS: Okay.

BY MR. LAWRENCE:

Q Now, with respect to the case of Mr. Smith, the record indicates that there were 23 jurors questioned and excused in the courtroom, 14 seated, for a total of 37; and every single one of them was white. And I'm wondering if you could give us any conclusion as to whether something like

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that could occur simply by chance?

A I hesitate to answer--I mean, my knowledge on this would be intuitive. It strikes me as being unusual. I mean, you would expect more blacks than what you've just described. .But I would have to do some calculation with probabilities, and I don't have that capability with me right now.

Q All right. Now--

A But I'm a little uncomfortable answering that question, just --

Q Very Good. Now, you divided the census tracts into three categories, and based on the amount of black population, and the highest categories over five percent. Do you think that your conclusions would have been any different if you had defined the three categories of low, medium, or high black population differently?

A Probably not, because what's happening here is that in that first analysis, there's -- just going back to that, that sets this whole thing up, there is very strong evidence that there's bias with respect to the numbers, that there are certain census tracts that are over-represented, certain census tracts that are under-represented, which means bias, and that I think 43 of these 112 show some bias with respect to the representation. And so if we had chosen some other way to describe that, by, say, that third category being, say, six percent black or - and higher, or

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seven percent black or ten percent black and higher, it would, the conclusion would be the same.

So I happened to choose this way that this Table 3 was, chosen just simply because it kind of intuitively made sense, that roughly a third of the census tracts in Kent County had more than five percent black residents in 1990, just kind of a natural way to divide the table, or to look at this issue, and that's why I did this. Mainly to help other people that are not statisticians to kind of understand what's going on here.

Q Okay. In line with that, on your Table 1, you have a number of different figures there, and there's, looks like there's 11 different categories, N TRACT, BLPROP, WBPROP, TOTAL, JURY, EXP, DIFF, P, RESULT, and REPRESENTATION, and I wonder if you could briefly explain to us what those categories mean in your table?

A All right. The easiest one is census tract, and that is just the census tract according to the 1990 census. The second -- the third variable is the black proportion, and that's the black proportion of the population of that

particular census tract as determined from the 1990 U.S. Census for Kent County.

And then the -- and that's BLPROP. And then in a very similar way, the WBPROP, which is the white proportion of that same census tract, again according to the 1990 U.S.

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Census, so we see, for example, that Census Tract 5, that the proportion of blacks in there, in that census tract in 1990, is zero, with the proportion of blacks in that some census tract, which is 5 in 1990, I have this to five decimals, but .98791, so roughly 98.8 percent of the population of Census Tract 5, between ages 18 and 69, is comprised of whites,

There's a group that's not missing in here -- there is a group that's missing, and that's all others, and I almost put this in the report but I chose not to, because we're not analyzing that group, But there is a third group, which would be "others."

Q And by "others," you would mean, I presume, Asians or Pacific islanders or others who would not be categorized as either black or white?

A That is absolutely correct. The next variable in there is "Total." And that variable is the total population that --of that particular census tract, again, according to the 1990 U.S. Census, for--and again, it would be the total population of adults age 18 through 69. So again in that Census, Tract 5, which is that very first one that's in the table, that population is 2,729 people.

The next variable in there is "Jury." Now, what that number is, it just, in the list of-- this is in that jury list that was selected that we've talked about which is

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the pooled list for the period October '93 through October of '94. It turns out that there are 28 of those people on that list that are identified as residents of Census Tract 5.

JUDGE LEIBER: Excuse me. Are we referring to page 6 of your report?

THE WITNESS: Correct.

JUDGE LEIBER: You're saying Census Tract 5, is that the number on the farthest left column?

THE WITNESS: No, that's--it's the second number, it's the one under Tract." I haven't explain "N" yet.

JUDGE LEIBER: I'm sorry.

THE WITNESS: Maybe I'll explain "N." I did this simply because I wanted to try to get some sort--we have so much data here to analyze. What I did, I tried to produce this Table I with -- it has summaries for each of the individual 112 census tracts. So this "N" is simply a number that gives the order -- we order the Census tracts by smallest to largest with respect to the black population in 1990. So your Census Tract 1, 2, 3, and 4, and so on would be those that have the smallest numbers of black residents in 1990, according to the 1990 census. And then when we get up to 111, 112, these have the most. If we go back to that part of the table, we can see in there that – just take as an example the last two census tracts, have

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proportions of blacks that are 88.7 percent for census -- this is the second number, N equals 111, the last census tract that I have labeled in Table 1 is the one that has the second largest proportion of black residents, according to the 1990 census.

JUDGE SULLIVAN: Meaning the letter N.

THE WITNESS: Yeah, and that is 88.67, and then the very--the Census Tract 112 is the one in Kent County that has the largest proportion of black residents, and according to this data, census tract data, that is 90.6 percent, roughly.

So I ordered-- what I did in this, was simply tried to provide--so the summaries here, so that one could kind of see from the table, conveniently, by eye, whether

there's an over-representation or an under-representation associated with the proportion of black population by census tract.

BY MR. LAWRENCE:

Q Okay. Could you now explain the categories "EXP" and "DIFF"?

A EXP would be the proportion of people that we would expect--let's just take as an example for Census Tract 5, which is N equal 1. We would expect, if random sampling were to have occurred, that we would expect 19.0634 black jurors to have been selected.

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MR. MCMORROW: Excuse me, black jurors, or just jurors?

THE WITNESS: I'm sorry, I said that wrong. Thank you very much.

That is a good point. We would expect 19.06 jurors to have been selected to the jury list, if random sampling had occurred. And that's calculated, I have an example in my narrative of how that's calculated.

BY MR. LAWRENCE:

Q But to continue, in the "Jury" section you have 28?

A We have 28, and actually we would expect there to be only 19.

Q And then the "DI"--

JUDGE SULLIVAN: You've got to wait until he finishes before you answer, and both ways, because she can only type what one person is saying. So if you can wait until he finishes the question, sir, and wait until --

BY MR. LAWRENCE:

Q So the "DIFF" category would represent the difference between what and what?

A It is the difference between what we observe, that's the number that are actually from that census tract on that list of 2,252 jurors, so there are--we observed that in that list there were 28 jurors from that census tract, okay, from Census Tract, in this case 5, and using the

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principles of random sampling, and assuming that the list--was comprised in a way that was similar "to the" composition of the 1990 census data, we would expect a little over 19. In fact, 19.0634, we would expect that many jurors to have been selected from that census tract.

And so now you've asked about the difference. The difference then, is that very next column, and that's just the difference between a jury, the number jury minus the number EXP, expected that "EXP" stands for expected. It's the expectation.

Q Now, the next column is "P" and what does "P" represent?

A It asks the question. If random sampling were occurring here, what is the likelihood that we would observe 19—in this case 19--I'm sorry, we observe 28 jurors from Census Tract 5, and we only expect 19; What's - what's the probability that that would occur by random sampling and the answer is .03983. It's not--it is significant, meaning that when we compare that to five percent or compare that to ten percent or compare that to 25 percent.

In other words, it's different, that number that we observe, 28, is different than the number that we would expect under random sampling, which is 19. So it's asking the question, is that what we actually observe, this 28, is it different than what we would get under random sampling, that 19. And the values, the P values are

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calculated, we ask that same question for each of the 112 census tracts.

So those--you notice in that that very next one, Census Tract 6 or N equal two, we observe 16 jurors on that, on the total list. We would expect by, again, principles of random sampling, 16.1854. So those are pretty close. But -- and the difference is, you know, -.18,

and the P value for that is .96, so high P values mean that there's agreement between what you observed and what you would expect. Small P values mean that there's a discrepancy or a bias.

Q And how low would the P number have to be before you would determine that the deviation was statistically significant?

A I used three determinations in this report. I used-- there's almost one that's used religiously in statistics, and it's the number .05, or five percent, and I used that here. But I also used a P value often percent, and also used a P value of 25 percent, simply to look at this with more than one P value criteria, of what constituted bias and what did not.

Q Okay. Now, speaking statistically, now, We have another witness who is going to appear after you, but if, for example, it could be shown that people were being excused for not being able to have transportation and it turned out that black residents of the county were far less likely

* * *

[Page 101] [intentional skip in pages]

BY MR. MCMORROW:

Q Well, the percentages that you obtained, then, of black population and white population for each census tract, were those percentages taken from the census data?

A Yes.

Q That total number, 322,383, then, was not taken from the census data?

A I believe I added that up from the census tract data that was given to me

Q All right. But let me understand--

A Can I answer that question?

Q Sure.

A If you go to Table I, and I believe if you were-- you see that one, two, three, four, the fifth column there that's totaled.

Q Mm-hmm.
A That's the total population of those that are 18 to 69 in that census tract in 1990. I think if you were to add those 112 numbers up, what that will yield for you is 322,383.
Q Okay. But the lines "BCPROP' and "WHPROP," those are from the official census data of the United States Census?
A That's right, and I did not--that needs to be attached to this report as appendix -- whatever I call it, I think Appendix A, and I did not attach that. But it needs to be
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part of this report.
Q And if I understand this correctly, your estimate is that there should have been 164 African-American jurors.
A (Witness nods head)
Q And that your estimation is--well, your estimation that 164 comes out through a just a straightforward statistical analysis?
A It's a just a straightforward calculation of the fact that there are 7.28 percent of the, of this particular profile of residents in 1990 in Kent County that are black, and so you' would expect 7.28 percent of the jurors of that list of 2,252 to be black, and so that's where you get your 164, just multiplying those numbers.
Q And your estimate is that there were 139 black jurors?
A That's right, because of--now, that doesn't say that, it just simply says what is the effect of the observed over-representation, somewhat over-representation of some of the census tracts, that are predominantly white, and the under-representation from those, in this case, last or roughly third of the census tracts, that have the largest proportion of black population, so those tend to be under-represented on the jury list. That's what I want

to I put in my technical report, how I actually calculated that.

Q Then your estimation would be that if there were 139 estimated black jurors and there should have been 164—

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A Under-representation altogether of about 15 percent.

Q 15 percent. Well, when I divide 139 by 164, I come up with 85 percent, which is just the reciprocal of that -- I don't know if "reciprocal" is the right word or not, it's been a long time since I've taken math, but r seem to vaguely recall that.

You used the term here that I don't understand, techniques of estimation. Can you explain what you mean by techniques of estimation?

A Well, that's what I need to put in the technical report here. We are assuming certain probability distributions, under the assumption of randomness, and that the trials—I think the easiest way to explain this maybe is just to go back to something that you think about when you're gambling or tossing a coin. Say you toss a coin 100 times. Well, it turns out you assume in there, when you toss those coins, that, toss a coin, number one, that the probability isn't gonna change as you go from toss one to toss two to toss 100, if that probability of producing a bead each time is .0513, that toss one is going to be .0513 at toss two and .0513 at toss 100. The probability structure stays the same.

And the second thing is that somehow, whether you got a head or tail the last time isn't gonna give you any information as to whether you're gonna get head or tails the

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second time, and isn't goanna give you any information as to whether you get head or tail the third time. We assume independence, so these are some of the -- now, these are some of the things that we're assuming in here.

That same of the principles of random sampling and that the census –that this list that the Secretary of State provides, and, also the way that it is -- that the jury lists are constructed, given the rather lengthy process it goes through - I don't know that I can recite all of this, but at least four different lists before it gets down to one that then is used to constitute what we observe here, the 2,252 that is the result of 11 terms, or about one year.

So we're assuming things like what I just described there, but the probability, the rules and laws of probability are just rather similar to what I just described in this coin toss experiment. Somehow there's randomness, we're not changing the probability structure, you can assume that probability structure. And then if I tell you that if the true head of, you know, than have got a coin here that possesses a property of producing a head, .0512, and 'we could sit here for the rest of our lives and dedicate our lives to tossing that coin and kind of test that out, then we use principles of estimation here, that if you did this and I did this, and we kind of looked at what happened over the course of a lifetime

* * *

[Page 125] [intentional skip in pages]

JUDGE SULLIVAN: Thank you very much.

THE WITNESS: Okay, thank you.

(Witness excused at 12:56 p.m.)

JUDGE SULLIVAN: It's 1:00, and where do we stand right now, ladies and gentlemen, as far as your expectations of additional testimony time?

MR. LAWRENCE: We expect to call Mr. Hillary, and we expect that he'll be fairly brief, and then we expect to call Mr. Metzger, and he possibly could be as long as Dr. Stoline, it's possibly a little less long, because he doesn't have a long report that needs explanation.

JUDGE SULLIVAN: We're discussing up here what the possibility is, rather than doing this this

afternoon, of doing it tomorrow morning. Would it be everyone's preference to do it this afternoon?

MR. LAWRENCE: That would be my preference, yes.

MS. YATES: And our witness from Detroit's preference.

JUDGE SULLIVAN: All right, then we'll reconvene at 2:30, is that all right?

MR. LAWRENCE: Thank you, your Honor.

JUDGE SULLIVAN: Thank you.

(Court recessed at 12:58 p.m.)

(Court reconvened at 2:40 p.m.; Court, Counsel, and both Defendants present)

JUDGE SULLIVAN: Thank you, everyone. Good [Page 126]
afternoon. We're a little bit late. Part of the reason for that is we both have settlement conferences, and frankly, we go out of our way to demand not only that the attorneys show up but that the parties or their insurance representatives with authority also show up. Sometimes they come from other parts of the state. It's very disconcerting to require they be here, then not give 'em sometime.

With that in mind, as we get into this an hour, hour-and-a-half, something like that, we may take a short break to touch base with these individuals again. So I'll warn you ahead of time, that's part of what we're trying to juggle with this afternoon.

Miss Seidl--is it "Si-dell" or "Side-el," I ask you that every time?

MS. SEIDL: It's "Side-el."

JUDGE SULLIVAN: Miss Seidl will be taking over for the People today, Mr. McMorrow is not here this afternoon.

And at this point, Mr. Lawrence, if you're ready to call your next witness, you may do so.

MR. LAWRENCE: Yes. I'd like to submit to the Court--I've made an extra copy of the exhibits, and they

have been marked, that is the Defense Exhibits A through G, just so that the Court can have an extra copy to put in the second file.

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JUDGE SULLIVAN: Thank you.

MR. LAWRENCE: I'm proffering those at this time, and I believe that Ms. Yates will call the next witness.

MS. YATES: Before we do that, I'd also like to inform the Court Miss Seidl has agreed to an additional stipulation. There was some question during Dr. Stoline's questioning, what be was talking about when he was talking about the terms, and Miss Seidl agreed to stipulate that the third term encompasses the period between January 3rd, 1994 and January 30th, 1994, which is when the trial of my client, Mr. Palmer, occurred.

MS. SEIDL: Just to be clear, that's on Table 4 on page 12 of his report.

JUDGE SULLIVAN: Since that's Judge Leiber's. case, it doesn't matter to me.

JUDGE LEIBER: I did, but I didn't get the report. The copy that was prepared.

MS. YATES: Stoline's report.

JUDGE LEIBER: The entire body of materials that were copied. Thank you so much. Where is that reference now?

MS. YATES: Table 4.

MS. SEIDL: Page 12 of the report, Table 4.

MS. YATES: It's in all of--

MS. SEIDL: Term 3 would be the one.

MS. YATES: And we'd like to call Richard Hillary.

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JUDGE SULLIVAN: Would you state your name and spell it, please?

MR. HILLARY: Richard E. Hillary, H-i-l-l-a-r-y.

RICHARD B. HILLARY

called by the Defendants at 2:43 p.m., sworn by the Court, testified as follows:
BY MS. YATES:
Q Mr. Hillary, how are you employed?
A I'm with the Kent County Public Defender's Office, I'm the director of that office.
Q And how long have you worked at the public defender office?
A This is my 18th year.
Q How long have you been head of the office?
A Since 1985, so this is my 13th Year.
Q Were you a criminal defense attorney before you joined the office?
A That was my first employment, so I've always been a criminal defense attorney.
Q Okay. Does your job require you to practice in Kent County Circuit Court?
A Yes, it does.
Q And how often?
A 100 percent of the time. This is the only place I practice. I do all of my trial work and all of my pretrial
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motions in 17th Judicial Circuit Court.
Q So you handle jury trials in Circuit Court?
A Yes, I do.
Q And about how many jury trials have you handled?
A Over 130 felony trials.
Q In the course of your job, then, you have the opportunity to observe the pools of prospective jurors that are called to service in Circuit Court?
A Yes, I do. When you speak of pools, the ones that come down to actually be voir dired?
Q Right.
A Yes, I have.
Q And would that also be true for the period of 1993 and '94?
A Yes, it would be.

Q Could you summarize for us your observations for that general time period, for '93 and '94, with respect to the number of black people who were represented in those groups of prospective jurors?

A It's hard to think back specifically that far, because I know some changes were made, but let me do the best I can.

Q Okay.

A I'm also co-chair of what's called the Jury Minority Representation Committee which was instituted by the Grand Rapids Bar Association as one of their committees. The reason for that committee was the lack of minorities,

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specifically black, in the jury panel and in the jury pools. My recollection is that committee was formed in late '92 or early '93. Back prior to 1993, or even halfway through '93 and up to '94, I recall there being very few, if any, minorities, specifically black potential jurors at all.

Traditionally; they would bring down approximately 150 jurors to serve for that month, sometimes as high as 175. During that time period, my recollection was that if you saw two or three blacks out of the 150 to 175, that would be about the maximum.

Q Okay, and was this a consistent problem, or just every third jury?

A It had been a consistent problem since I began my practice in 1980.

Q How common, then, was an all-white jury?

A It was more common than -- I guess the best way to say it, if I said it in terms of percentages, 98 percent of the time we had all-white juries.

Q Was this a matter that was discussed among the lawyers who practiced in Circuit Court?

A On a consistent basis.

Q On a consistent --

A Yes.

Q And to your knowledge, was, the problem acknowledged by the
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Circuit Court judges?
A Yes, it was.
Q And you mentioned the committee; was that the way that the local bar was involved in this issue, then?
A Right, the local bar became involved, and how they actually became involved, whether it was through the attorneys being aware of the problem or it was a combination of attorneys and the bench, I don't recall, generally, there was a very pressing need to establish this committee.
Q And what again was your role in the committee?
A I was co-chair, along with a local attorney, Steven Drew.
Q Is the committee still doing its work?
A Yes, it's a standing committee.
Q And what was the specific purpose of the committee?
A Well, the purpose initially was to do anything that we could, even if we had to go to the Legislature, which we haven't yet, to study the jury selection process, in an attempt to find out any existing problems, but our goal was to increase the number of minorities during the jury selection process.
Q Okay, and what did the committee actually do?
A You're asking me -- I did not review this material when I came in because of the late subpoena, but let me do the best I can. Initially, there was a study done by City High
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School students under the direction of a Mr. Wayne Bentley, who is also a member of that community-- committee; and they studied those potential jurors, a cross section of the community who in fact did not return their questionnaires, to find out the reasons why they were not returning those, questionnaires.

The reasons were economic, lack of child care; lack of transportation, it won't make a difference whether I'm there or not. Those are the reasons that come to mind that the City High School students arrived at. They also took the areas where the unreturned questionnaires were not coming back from, and did a city pin map, and the clusters of where they weren't coming back from were in the high minority areas.

Q Did anybody ever do a study of the actual racial makeup of the the jury arrays that you know of?

A When you say racial makeup -

Q Actually who on the juries is black and who is white, or other--

A You mean when the 150 to 175 ones are called?

Q Right, besides just observing, well, it looks like there are three-

A No, the City High School students selected by Mr. Bentley, when that jury panel first had their first day, would literally go up to the fourth floor where they congregate,

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stand amongst them, and count. Now, there's obviously some error in that, because they may miss a light-skinned black person, for example. They may miss an Asian or an Indian or maybe a Hispanic, and they weren't counting just blacks, they were counting all minorities when they did the hand count.

Q Did the Court cooperate with the mission of the committee?

A They not only cooperated, they endorsed the establishing of the committee. In fact, as I said earlier, it may have been certain members of the bench that pressed for the committee to be formed.

Q Did the committee make formal recommendations?

A Yes, they did.

Q And were those -- what were those?

A Well, the recommendations -- when I say formal recommendations, Kim Foster, the Circuit Court administrator, also was invited to attend our committee meetings and was also a standing member. And when we brought certain issues to his attention, he would take this information back, and my understanding is that he would confer with Judge Kolenda, the chief Circuit Court judge, and if they obviously didn't violate the statute, they would simply do what we asked of them.

Q And can you give me some examples of what these recommendations were or what changes were made?

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A Sure. The first recommendation is--and again, the numbers aren't totally clear in my head, and the times, is that there was a tremendous amount of non-returned questionnaires and undeliverable questionnaires. Based on the City High School study that they did, we suspected that we were losing most of our minorities in the fact that they were unreturned questionnaires, weren't even filled out, or undeliverable. We were able to make that determination, obviously, from the pin map from the initial study.

As a result of that, we asked Kim Foster, would there be a problem in doing a second mailing to the unreturns? I don't recall if the undeliverable immediately were sent a Zip-code-plus-four mailing to the same census area. But I do know that the questionnaires that weren't returned at all, that a second mailing went out to those, and there was a rate of increase on getting those back about 50 percent. For example, if there were 4,000 unreturned questionnaires, on the second mailing we would get 2,000 of them back.

Q When was that change implemented, the sending of the second letter?

A Well, my recollection was, it was in 1994, or maybe late '93. I don't know if it was done immediately upon the forming of the committee, because I know we spent our first several meetings --and we only had one a

month—going through the entire process, the statutory process, to see
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if there was any problems with that, and I know we were discussing at length the City High study, and my recollection was that it wasn't as early as '93, I may be wrong, I thought it was into '94.

Q What is your overall impression of how the representation of minorities has changed over the years since you've been involved in the committee?

A Since we've changed the mailing process, since we have mailed out again the jury questionnaires to the ones that didn't respond, since we've, in that second mailing, put a little stronger language as to sanctions, and since we started mailing out undeliverables, there has been a noticeable increase in the number of minorities that show up.

MS. YATES: I don't have any more questions.

DIRECT EXAMINATION

BY MR. LAWRENCE:

Q Now, Mr. Hillary, were you familiar with a procedure that was once in place, where qualified jurors were first sent to District Court and then those that remained would be placed on Circuit Court pools

A Yes.

Q Okay. And was that a concern of your committee?

A Yes, it was.

Q And can you explain why?

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A The pin map, the City High pin map, and through common knowledge, indicated that in the city areas which the District Courts encompass, are your highest percentage of minorities, and the concern was that we were pulling out numbers for the District Court, the District Court would select first, and then not even return the unused ones to the Circuit Court panel. And we made a determination that we were losing minorities by choosing the District Court jurors first and not

returning the unused ones to the ones--the pool that the Circuit Court was taken from.

Q And that was a conclusion that your committee .reached immediately or after some months of study?

A Some months of study.

Q Okay. Now, Mr. Foster testified that they changed that policy approximately October 1st of '93. Does that date sound right to you?

A I thought it was later, but I'm not gonna quarrel with Mr. Foster. Again, I've never recorded the dates. I thought it was later than that, but it could have been.

Q Okay. Now, you indicated that in your experience, you saw all white juries approximately 98 percent of the time.

A Well, yes, and I'm taking 'that number off the top of my head, because here's what I would recall. Having tried a lot of cases and having my staff try a lot of cases occasionally, rarely, it would be quite exciting when one [Page 137]

of my attorneys would come back to the office and say, "Oh my gosh, oh my gosh, there was a black in my panel"

Q Would it be fair to say that in your experience, as a public defender, you've seen more black defendants than black jurors?

A No question about it.

Q That it's true?

A Yes, it is.

Q And do you know whether it was discussed by the committee any steps that could be taken in the courtroom, after the individuals arrived, to try to increase the number of blacks that actually sat in the jury box?

A You mean once they were already in the courtroom to be selected?

Q Yes.

A I recall no discussion what to do at that point.

Q All right.

MR. LAWRENCE: I have no further questions. Thank you.

JUDGE SULLIVAN: Miss Seidl?

MS. SEIDL: Just a couple quick questions.

CROSS EXAMINATION

BY MS. SEIDL:

Q So if we were discussing some dates that the changes -that some of the changes took place, you would defer to Kim

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Foster, if he gave us dates as of October of '93 that some of these changes were implemented?

A I would defer to anyone that gave a different date as I recall it. I thought it was later. If someone else told me it was 1994 or 1993 or even late 1992, I couldn't quarrel with it. I just don't know.

Q Okay, thanks. When you were on the committee, and the—you basically--did you have your own investigation, or did yon basically rely upon the City High report as to why there was so few minorities in the jury pool?

A We relied on the City High report as to some of the various reasons as to why the ones that did not answer their questionnaires didn't return them, and what the report also told us was -- and we did rely on it- the areas where the unreturned and undeliverable questionnaires wore located.

Q As part of that, committee, was there ever anything said or done, or any investigation as to the process that was used to send out these questionnaires in the very first place, as in, was there any, anything that was obvious, that they weren't being sent to everybody that they should have been sent to?

A No, I never recalled that being mentioned, that when someone was asked about a jury questionnaire that wasn't returned, I don't recall them saying that they didn't receive it.

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Q And as far as you know, when the jury questionnaires--when they had their group of people, the master list, that they would send it to, you have no reason to believe that master list -- that everybody that was on that master list was mailed their questionnaire?
A No, many of them were undeliverable and they came back, so we know that everyone didn't get the questionnaire,
Q Right, but there's no suggestion that they didn't send 'em to a certain area, that questionnaires were not sent to the inner city or--we were talking a lot about census tracts. There's no inclination ever that they were not sent to certain census tracts, would that be your understanding?
A No, that discussion never came up, that there were certain areas that the questionnaires in fact weren't sent to. Because of the random selection process, that wasn't a concern of ours.
Q Okay. And as far as you know, the whole process of sending them out in the first place, the questionnaires off the master list, was the stature being followed? Did your committee find that the stature was being followed?
A My understanding was we did--we had no quarrel with the statute being followed. We talked about perhaps eventual legislative changes, about expanding the list from driver's licenses and state ID's to include other things. That's still on the committee things to do on legislative changes,
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but, no, we always felt that the process was being followed.
Q And if there was ever--one final question. If there was ever a problem once the jury was actually seated here, you wouldn't need any discussion as to how to make sure that a black member stayed on, because that would be covered by Batson, would that be accurate?
A Prior to Batson, on many major trials out of our office, we would make the objection regardless.

Q Okay.
A But, no, other than Batson, there' was nothing else.

MS. SEIDL: Okay, thank you, no further questions.

MS. YATES: I have no further questions.

MR. LAWRENCE: Nothing further.

JUDGE SULLIVAN: Mr. Hillary, I hesitate to ask you this, and it's something--I just haven't looked at it lately. The statute that you referred to dealing with jury selection and so forth, does that have within the four corners of the statute a requirement that it be--what's the word I'm looking for? Random.

THE WITNESS: In the statute, and I haven't looked at it in a while, your Honor, that the names from the Secretary of State, which are all of the driver's licenses and ID numbers in the whole County of 'Kent, over, 300,000 of them, there was never--in there, it's the key number that

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they use to send the approximately 50,000 names to us, and that's the randomness that's suggested in the statute is sending the 50,000 names, approximately, to us using the key number from the original 300,000, if answered your question properly.

JUDGE SULLIVAN: Are you saying that beyond that the requirement of a random selection is not there, or—

THE WITNESS: Well, and there still must be a random selection once the 50,000 names are gotten, by each individual county.

JUDGE SULLIVAN, Maybe you're not the one I should be asking this to, it probably should have been the statistician this morning, but isn't that part of the problem, that once you start to address the concerns that everybody had, I guess the bench, the bar, everybody involved with the system had certain concerns based on perceptions or whatever, isn't the requirement for

randomness actually violated, if you will, by doing some of these things that everybody seems to feel was an appropriate thing to do?

THE WITNESS: That I don't know the answer to.

JUDGE SULLIVAN: Any questions?

JUDGE LEIBER: I have none.

JUDGE SULLIVAN: All right-thanks a lot, Mr. Hillary.

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Is the witness excused?

MR. LAWRENCE: Yes.

MS. YATES, Yes. We next call Kurt Metzger.

JUDGE LEIBER: Do you have any objection to excusing Mr. Hillary in the context of my case?

MS. SEIDL: No.

JUDGE LEIBER: Thank you.

JUDGE SULLIVAN: Would you say your name and spell it for us please.

KURT R. METZGER

called by the Defendants at 3:03 p.m. sworn by the Court, testified as follows:

MS. YATES: May I approach the witness?

JUDGE SULLIVAN: Certainly.

DIRECT EXAMINATION

BY MS. YATES:

Q Mr.: Metzger, I'd first like to have you identify this

A That's my resume.

Q Okay. And I'd like to offer as Exhibit H, which Miss Seidl has no objection to, Mr. Metzger's cv.

JUDGE SULLIVAN: Is that correct Miss Seidl?

MS. SEIDL: That's correct.

JUDGE SULLIVAN: I presume, Mr. Lawrence, you don't, either?

MR. LAWRENCE: No objection.

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BY MS. YATES:

Q Mr. Metzger, where do you work?

A I work at Wayne Stale University.

Q What is your position there?
A I direct a program called the Michigan Metropolitan Information center, or MIMIC.

JUDGE LEIBER: I'm sorry, what's the name of the program?

THE WITNESS: The Michigan Metropolitan Information Center.

BY MS. YATES:

Q That's known as MIMIC?
A Known as MIMIC.
Q How long have you worked for MIMIC?
A Since May of 1990.
Q How long have you been the director?
A Since October of '93.
Q What does MIMIC do?
A Well, MIMIC basically answers questions by using available data sources. We do demographic and economic research. We utilize a whole host of databases, from census information to state data sources, to private sector information, and do a wide variety of studies.
Q How is the organization funded?
A We are very soft, soft funds. We basically operate on

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grants and contracts primarily. So we are partially funded somewhat by the University, and we're housed in the university, but we have to cover our own expenses
Q What does your job as director of MIMIC entail?
A My job is basically one of supervising staff but also coming up with the money and the projects to fund the staff, to buy the equipment, and also I do a great deal of the data presentations, the analysis, I go out and do allot of talks, and I go to a tremendous number of meetings.
Q What is your educational background?
A I have a Master's degree in experimental psychology; and basically all the course work toward PhD., and left with a dissertation to go.

Q Before you came to MIMIC, who was your employer?

A I worked for 15 years with the United States Census Bureau.

Q What positions did you hold for the Census Bureau?

A I started out as a survey statistician working, on what they called special censuses, communities that had grown large enough between, between the decennial censuses.

THE REPORTER: I'm sorry?

A Decennial censuses, ones held in years ending in zero. They could have the Census Bureau conduct a special Census to find out how the population had grown =, so they could qualify additional monies. I then went on--

Q What was the time period for that?

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A That was basically from '75 to '76. Prior to that time, I had worked while I was going to graduate school as a survey researcher, and had done surveys while I was going to school in Cincinnati. After the special censuses in '77, I moved over to a position called geographic planning specialist, in charge of geographic operations in the Detroit office, and in that respect, I visited and worked with planning agencies throughout the states of Ohio and Michigan, updating maps and address sources for use in the 1980 census, for mailing out questionnaires and developing mailing lists.

In '79 I moved over to a position of administrative director for the census out of the Detroit office, and I was responsible for administrative activities in 35 district offices in the two states.

And then in October, I believe, of 1980, I moved over into the position of director of the information services program.

Q For the Census Bureau?

A For the Census Bureau. And that program consisted of taking census information and taking it out to the public, showing what information--they responded to the census, this is the information the census is giving back, this is the kind of information that's available to you, this is how you can use it, this is how you can use it to your

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benefit to get funds or whatever you want to do. And I then did a lot of workshops, presentations, and basically data analysis.

Q Could you summarize the basis of your knowledge and your experience in the area of demographics?

A. We'll I've been working with demographics, certainly, since 1980 when I took over the position in information services, that's been my--working with population and housing information, teaching people -- learning the background, how it's collected, how it's used, what kind of information, and I've done extensive reading, taking classes, and certainly I tend to be recognized enough that I'm called upon to speak on demographics and I do a lot of visiting in a lot of classes. So I've been working with demographics since 1980 full-time.

Q Could you--same question--summarized the basis of your knowledge and experience in the area of surveying?

A Well, I've done work, obviously, when I started with the Census Bureau, I was involved in being a survey interviewer so I got some background on how surveys were conducted through the Census Bureau. I then, in my position certainly within the census, conducting the 1980 census, there is a survey component to the census, and learned a great deal about the whole methodology and sampling methods that are used and then during my last ten years with the

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Census Bureau, I spent a great deal of time teaching people about the whole survey methodology, learning about other surveys the Census Bureau conducts, which they do for all government agencies; and being able to speak on how the samples are conducted, how the surveys are done.

And now that I'm with MIMIC, MIMIC is part of the Center for Urban Studies, and we have a survey evaluation component in this center, so I'm involved in allot of survey work with the Center for Urban Studies.

Q Have you authored articles and publications in these areas of demographics and surveying?

A I've done a lot of publications through MIMIC in terms of taking demographic information and producing reports I've also written several articles on surveys and some of the background information for the census.

MS. YATES: Your Honors, I would move to have Mr. Metzger qualified as an expert in demographics and surveying techniques and in the use of census information.

JUDGE SULLIVAN: Miss Seidl?

MS. SEIDL: No objection.

MR. LAWRENCE: We concur.

JUDGE SULLIVAN: So ordered.

JUDGE LEIBER: In the case involving Mr. Palmer, I likewise will permit the witness to give his opinion on the areas falling within his training and expertise.

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BY MS. YATES:

Q In your work at the Census Bureau and MIMIC; have you been aware of problems involving the representation of minority respondents in the context of surveying and census projects?

A Yes, very much so. One of the major contentions in census particularly in the census, is the under-representation of minorities in terms of the final counts.. Lawsuits have been tiled for the last several decades,

primarily much more so recently, because of the the between the census and funding for states and municipalities. But there has been a historical under-count of minorities in the census, primarily as a result of lack of response, not filling out questionnaires, and there are a host of other variables that enter into that.

Q In your experience, what are some of the underlining causes of this under-representation, as a general matter?

A Well, if you look at census results and look at some of the under-counts, for one thing, African-Americans were under-counted six to one as opposed to whites in terms of the 1990 census. We know that there are also under-counts of renters, there are under-counts when you have households that tent to concentrate n unmarried households.

There are under-counts when you have households that tend to be more mobile, and there's under counts in certain

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neighborhoods where you tend to have either poorer conditions or various untypical housing situations. And all those factors are much more prevalent in the African-American community than in the majority community.

Q Okay. Now, in your experience, is the problem more or less pronounced when the entity that is attempting to solicit participation is a governmental organization?

A Well, the one thing, it's more pronounced, I believe –I mean, when you talk about a governmental entity, what that brings in is the whole issue of fear of government, a kind of a suspicion of what government is up to. This whole--in some cases, basically, hostility toward government, not looking at it as a positive force, but rather a negative force, and why is this kind of information being asked of me. And the tendency, more so in the minority community, is to avoid government

forums and to basically throw them away or just not deal with them at all.

Q In your opinion, would responses to census inquiries be analogous to responses to jury questionnaires and summonses?

A I think so, very much so. It's a governmental unit, it's an official body with a governmental tie. It's some official agency asking for specific kinds of information, asking responses on personal questions, and asking you to send it back, and I think that -- I don't think that

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there's a real differentiation.

Q Now, what's the basis for your opinion about this concept of suspicion and intimidation?

A Well, I have a couple reasons for feeling that way. I mean, probably more so than anything else is personal experience, in terms of going out and teaching of census information, teaching about census information, talking to community groups, and, as I said, throughout Michigan and Ohio and into West Virginia. When we broadened our scope, I worked with a lot of minority groups and a lot of organizations that deal with minority groups NAACP, Urban League, and other groups, and I was constantly told that those numbers don't really reflect our community, they are under-counts, and people saying "I did not respond to the question," I mean, personal experience, having people say, "I did not fill out the questionnaire." Or "I know someone else who didn't fill out the questionnaire," and similar to the high school study, these issues of people knowing that they didn't and giving reasons that they didn't.

The other thing is that since the Census Bureau has been doing studies for several decades, ethnographic studies and others, where they go into the communities and try to recount the population and match it with the original census count and then interview people, and the

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results of those studies are showing that kind of hostility and suspicion.

Q How well accepted is the existence of minority under-representation in these areas, in the surveying and census taking. Is it a given?

A It's a given, the only question is the size of the under-count. There's no doubt that there's an under-count, there's no doubt that these factors enter into it. And it's just a matter of degree.

Q Okay. Have the people who work in these areas, including you and your group, developed ways of combating this presumed under-representation, or of compensating for it?

A There have been a number of initiatives that the Census Bureau has undertaken, and the studies continue to this day, and leading up to the next census in 2000. The primary ways of doing this have been with additional mailings, but more so with trying to get into the community and find out who are the leaders, who are identified as the leaders, not who are the leaders, as we traditionally think of as mayors and people, corporate people, but, rather, who are the leaders as far as the community, views them" and having those people speak out about the issues, saying that the census is important.

We use the census as an example, the census is important, the information you give is confidential, it

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can't be given to anyone else. If you don't count yourself your community doesn't get the monies, the programs that your family and your relatives need win not be there because the need won't be shown. So there's a great deal of trying to get into the community and get the word out in a number of ways.

Also, the whole idea of advertising. There's more and more efforts at putting advertisements out into the community, putting 'em in the community where' people will see them. How do people tend to get their information, is it on radio, is it by TV, supermarkets, is it

in the comer store, is it at the Social Service or FIA office? Where do people tend to go and where is information most effective?

And what's now going on is we've--the Census Bureau has gone to the National Advertising Council to try, to get free advertising. This time they figure the only way they are going to do it is to pay for advertising, so they are going to national advertisers and then identifying minority-owned advertising companies that are there to develop messages for minority groups specifically.

Q You mentioned addressing the mailing problems. What are some of the techniques for dealing with that?

A In terms of -- oh, in terms of --

Q Techniques for combating under-representation that appears to arise from mailing issues, undeliverables, that kind of

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thing?

A Well, the Census Bureau has made an effort to compile accurate address lists. I mean, that's one thing, and trying to get a comprehensive address list. There are certainly questions that have to do with how comprehensive that address list is. Basically, what the Census Bureau is doing in terms of mailing is they do not, Census Bureau does not identify individuals, they identify addresses. So it's somewhat different.

What will be done is that multiple mailings will be done to alert--now what's being done is there are even pre-mailings, saying that you will be getting a questionnaire, and then once the questionnaire is mailed and, there's a follow-up saying, "Did you get the questionnaire? Did you fill it out? Did you return it?" Those that don't get returned, enumerators are sent out to try to get the questionnaires.

In addition, those questionnaires that are returned are put back in the field and checked to see why there's a return, because in the Census Bureau's

case, returns only arise from a bad address, it's not that the person isn't there. If they do a survey and they are directing to a person, they will try to find out where that person goes or replace that particular questionnaire.

Q What kind of success bas been demonstrated by these various

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solutions you've told us about?

A Well, mixed success. In some areas we've seen increases in response rates, certainly. What has happened is that the mailing response, the Census Bureau mails out the questionnaires and people are to mail them back. That has gone, over the last 20 years, from about a 75 percent to about a 65, 62 percent response rate, so we see those, dropping even with all these efforts. A lot of that is due to the tremendous growth in the immigrant population, the non-English speaking population. So you have a lot of additional problems.

In fact, the 1990 census showed the first increase in under-count over the last five decades. The undercount percentage had been dropping, all of a sudden in 1990 it jumped up, and that has opened up a firestorm of ideas of what are we gonna do in 2000. But a lot of the efforts in terms of surveys and everything have been to try to increase that response rate.

Q Okay. Jury service is different from census data collecting and surveying, in that the people actually have to go somewhere to participate. Now, in your position at Census Bureau, or mostly MIMIC, do you have any experience with situations in which the people in question are being asked to do more than fill out a surveyor questionnaire, that are being asked to do something?

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A Well, we've been doing a lot recently, been working with the Family Independence Agency, for one example. Family Independence Agency has the

governor's study, something called Project Zero, which is to put welfare people to work. I mean, you have the same kinds of issues.

Same kind of issues come up with the school-to-work issue, where you're training people in school to get to work. Primarily with Family Independence Agency, there's one thing to give somebody a job, but there are the barriers that you have to overcome in order for that person to continue in that job, to take that job and to continue, and those primary barriers are child care, and the issues of transportation that have been brought up before.

But you find that particularly in minority households, and I've got some numbers for Kent County to show that, you have a high percentage of households with children that are single-parent households. So there's the whole issue of child care, and affordable child care, and child care at hours where people, when people are asked to participate.

Then there's the whole issue of transportation. A large percentage of African-American households, particularly single females with children, do not have vehicles available, so they have to depend on either public transportation or some other method, or a friend or somebody to get them to work, and the same would apply to

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getting to the courts.

You have to, first of all, have some way of taking care of your children and to afford to be able to do that, then you also have to have affordable transportation.

Q Okay. Now, you were referring to some Kent County numbers. Did we ask you to conduct research specific to Kent County population using census information?

A I was asked to look at some of the data we had.

Q What did those studies entail?

A Well, what I did, and time didn't allow me to look at the census tract detail, but what I wanted to do was look at the African-American population in Kent County versus the white population in Kent County, just to get a feel for what kind of differences in terms of economic and demographic differences are there, particularly looking at those kinds of characteristics that tend to lead to non-response or lowered response rates to survey.

Q You were relying completely upon U.S. Census data?

A Yes.

Q What were your findings?

A For instance, one thing we talked about was single-parent families with children. African-American--families with children, 64 percent of African-American families are single parents, as opposed to whites, which are only 19 percent. So, right away, you have a three to one ratio,

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African-American single parents with kids versus whites.

Q In Kent County?

A In Kent County. These are strictly Kent County, and that's across the board, from the City of Grand Rapids through the suburbs.

JUDGE LEIBER: May I interrupt so I'm certain I understand this? You've told me that in Kent County, 64 percent of African-American families are single parents?

THE WITNESS: Right, African-American families with children. There are--we get into these definitions, just like a definition of census tract. The Census Bureau identifies a family of two or more people who are related by blood, marriage, or adoption, so it could be brother and sister living together, grandmother, could be any combination. In this case we're talking about families with a child under the age of 18. And once a child reaches 18, they are no longer considered a child by the Census Bureau.

JUDGE LEIBER: Just so I understand--

THE WITNESS: Confusing it more.

JUDGE LEIBER: I didn't want to get into any kind of argument, I just want to understand the nature of what you're telling me when you use the term "family," The reason I say this is because you were speaking earlier about the inability to find day-care. So this statistic of

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64 percent of African-American families in Kent County includes single parent families and what else?

THE WITNESS: Well, families would be married couples, so you'd have married couples. You have family households and non-family households, and essentially, African-American and white, the percentage of all households that are families are similar. But when you look at families with children, whereas whites tend to have about 81 percent of those households are married-couple households, for blacks, in Kent County for blacks it's only 36 percent. 64 percent of all households are single parent, or families are single-parent families.

JUDGE LEIBER: I'll ask you to repeat that again. 81 percent --

THE WITNESS: 81 percent of white families with kids are married couples, as opposed to in the African-American community, it's about 36 percent. And on the other side, single parent families with children, for whites it's 19 percent, for African-Americans, 64 percent. We talked about unmarried households tend to have lower response rates overall.

There's also the issue, if you look at poverty, poverty is an indicator. Oftentimes when people are poor, they tend not to respond or there are other issues involved. The poverty rate in Kent County as a whole, for

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whites, was just under seven percent, 6.7 percent. For African-Americans, it was 31.5 percent, almost a five-to-one ratio.

Another characteristic is renters, there tends to be an under-count. Renters tend to be more mobile, obviously, but they tend not to respond as readily as homeowners. And in Kent County's case, 27 percent of whites are renters, 59 percent of African Americans are renters.

Okay, and in terms of mobility, we looked at—the census looks at how my people moved within the 15 months prior to the census, so what is your kind of average turnover on a yearly basis or every 15 months. For whites it was 20 percent, for African-Americans, 32 percent.

And finally, talking about the issue of transportation and trying to get to the courts or get to a job or anything else, six percent of white households in Kent County reported not having a vehicle available. 30 percent of African-American households reported that. So again, five-to-one ratio.

Q Did you do any studies about education level?

A Yes. In terms of education, I just looked real quickly at percent high school graduates. Again, we talk about one of the big factors for people not responding is inability to speak English, but there's also just the educational level that the--the ability to understand the questionnaire,

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the ability to understand what is behind the questionnaire.

The differences weren't quite as drastic, but in Kent County's case, 82 percent of whites had a high school diploma, 66 percent of African-Americans had a high school diploma. This is for people 25 years of age and over.

BY MS. YATES:

Q What's the significance of these findings?

A Well, I see it as one of the—it was addressed somewhat prior to this, in the last testimony. The Census Bureau has identified the need to basically get out there ahead of this, I mean, identifying those kinds of areas where you know you're going to have problems. Just because we know what kinds of characteristics lead to non-response, we know what kinds of characteristics tend to lead to under-representation. In that case, we have to try to .come up with methods to overcome that, we should identify those areas, we should go out there and take the lead and try to get the word out and concentrate on those areas to make sure that we get adequate representation.

Q Okay. In your opinion, what kind of an effort is required to have a meaningful impact on the under-representation that you have said is a given?

A I think you need a significant undertaking, I think you need the issues of getting out into the community and

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explaining what the courts -- I .mean, what is it? You know, just saying it's your civic duty to participate, or that you're going to get fined or imprisonment if you don't, doesn't do it. You need to explain why is it important, what is this about, what is this form about, how is the information going to be used, why is it a benefit for you to participate in the judicial process.

And also, I mean, I think because of the racial distribution of, a lot of times, people on trial, it's very important for the community to realize that they need to be--needs to be a judgment of peers, and that peers are not being addressed in terms of representation.

MS. YATES: I have no further questions.

JUDGE SULLIVAN: Mr. Lawrence?

DIRECT EXAMINATION

BY MR. LAWRENCE:

Q Mr. Metzger, can you explain to us exactly what does the word "random" mean in the demographic and scientific community in which you work?

A Random is basically choosing, in other words, coming up with some kind of list, and I tend to think that you need to come up with a comprehensive list, as comprehensive as possible, and there's some question as to the procedures that are used for the courts, but basically, taking a list of names or addresses, or whatever you have, you take your universe, and then you select by use of a random numbers table, basically, which is just a set of numbers. You pick one number, and then you select a certain-every fifth one after that, every tenth one after that, it's basically--a number is chosen that has no tie to the actual base that you're working with, and from there you select a certain, you know, you continue to select a certain number after that.

Q Okay. Now, if we assume that names are randomly taken from the Secretary of State list for the master list of potential jurors, but then individuals are allowed to request to be excused because of various excuses like having no ride, having no babysitter, et cetera, then would the results continue to be random, or would we have something other than random at that point?

A Well, you would probably have -- you will lose the randomness, unless, unless you have people opting out at the same ratios as they are represented in the overall sample to begin with, which I would doubt.

Q Now, we have presented statistics that in the State of Michigan the black population is approximately 13 percent, yet the number of those sentenced as felons in any particular year, the black percentage, is 55 percent. And I am wondering if, in your opinion, if all of

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those who are presently under felony sentence are to be excluded from those who appear on the jury lists,

whether that would tend to cause disproportionate under-representation of black citizens?
A That would certainly lead to that. I mean, that would certainly be a factor in it, yes.
Q Okay. Now, concerning if an excuse is accepted, that the person has no adequate child care, and we have the black community being 64 percent of the families with children being single parents as opposed to only 19 percent of the white population, would that excuse of not having child care tend to have a disproportionate effect in the black community, their representation on jury panels, as opposed to the white population?
A I believe it would, certainly, from the statistics. I mean, I'm not sure about how many people would select that as an excuse, but certainly based on the statistics, it would seem to indicate that you would have a much higher percentage in the black community requesting that.
Q Okay. And can we assume that your answers would therefore be the same with respect to people who have moved within the last 15 months, or people who have no car?
A Yes.
Q All right. Now, there was some testimony earlier about certain follow-ups by telephone for people who simply didn't show up for court, and I'm wondering if your – you
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have any experience or knowledge that leads you to reach any conclusions about the number of black persons versus number of white persons, percentage-wise, that have telephones in the home?
A I don't have the numbers specifically, but I do know that, African-Americans tend to have a higher rate of no telephone available.
Q Okay. If it turned out -- well, as we've had testimony, that certain census tracts that have a high percentage of black residents are being under-

represented by the time that the individuals come to court for jury service, if an effort were made to boost the number of questionnaires that were sent out in those census tracts, could something like that help to eliminate the statistical discrepancy that was described by Dr. Stoline?

A It certainly could help. There are several questions that still remain. We don't know, first of all, how representative the Secretary of State lists are, and if they tend to be biased in terms of the percentage of African-Americans who have either a driver's license or an ID versus whites.

We don't know how the final list, there's no indication of that, list one, I believe, that was, resulted in letters being sent out, how representative that was in terms of census tracts. I think that's something that

* * *

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of the community in a governmental solicitation, without employing affirmative efforts to, you know, boost or increase minority representation?

A I have not, in terms of doing it by virtue of sending out a form and working with the results of returns, I don't think you can.

MS. YATES: Okay.

JUDGE SULLIVAN: Mr. Lawrence?

MR. LAWRENCE: I'll be very brief.

REDIRECT EXAMINATION

BY MR. LAWRENCE:

Q Mr. Metzget, you were asked a question, you were asked to distinguish between the procedure used in Kent County with not following up on undelivered or no answered questionnaires, and I'm asking you, wouldn't that not following up also be part of the procedure, that is, whether they--the extent to which they follow up or don't follow up, that is part of the procedure, is it not?

A Yes.

Q All right, and then one other thing. When people seek excuses to be excused from jury duty, those people select themselves, and therefore, that in itself would not be random, is that right?

A That's true.

Q And therefore, it would be impossible to have a random

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system if you permit any excuses?

A That's a good point, because that's another procedure that take's the randomness out, yes.

Q But it would be possible to have a system where the racial groups are--appear proportionately to their percentage in the population, even though excuses are permitted?

A Right, yes, it would be.

MR. LAWRENCE: Okay, no further questions.

JUDGE SULLIVAN: Okay. thank you very much. Appreciate you being here.

Did you have some questions?

JUDGE LEIBER: Miss Seidl, do you have any other questions?

MS. SEIDL: No.

JUDGE LEIBER: I have no questions for the witness. Thank you.

JUDGE SULLIVAN: Thank you. Is the witness excused?

MR. LAWRENCE: Yes.

JUDGE LEIBER: Miss Yates?

MS. YATES: Yes.

JUDGE LEIBER: Any objection, Miss Seidl?

MS. SEIDL: No objection.

JUDGE SULLIVAN: Thank you, sir. Will there be other witnesses?

MR. LAWRENCE: Your Honor, We plan to call no other

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witnesses at this time. I'd like to call the attention of the Court to the fact that we were under the impression before today that certain statistics that cover this September '93 period where my client's jury was picked were not available. We are now told today that those statistics are available, and we hope to get them and go through the same kind of analysis that we've gone through before and submit them to Dr. Stoline, and I'm told that this whole procedure, that we could probably have a report back from Dr. Stoline that covers this period where my client's jury was selected within approximately one month.

I am also told by Mr. McMorrow, and I suppose Miss Seidl can confirm this, that they also would like some additional time for the purpose of submitting information to their expert and coming back with certain reports before the Court issues opinion and ruling.

JUDGE SULLIVAN: I'll let Judge Leiber speak for himself. The biggest problem -- I don't have any problem with that, and I think it would be helpful. The problem, of course, is the Court of Appeals order that said no extensions, period, no if's, and's, or but's about it. And I presume you and/or Mr. McMorrow, and all three or four of you, whatever, will be in touch the Court of Appeals about this problem

MR. LAWRENCE: Yes. As I read the order, I think it's -

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a fair reading that they only required the hearing, that is, the live witnesses, to take place by the deadline. They didn't say that your rulings had to be in by that date. And so I believe that we would be complying even if your rulings were delayed beyond that February 13th date. But we intend to contact the Court of Appeals and inform them of that, if that is what the Court determines to do.

JUDGE SULLIVAN: It would seem to me, and again, Judge Leiber may have a different thought about

it, and perhaps it doesn't apply quite as much to his case as it does to mine, since mine was in this earlier period of time before these studies were done here, a month earlier than that, the mere submission of those materials might be adequate. But, you know, I'm thinking on behalf of Mr. McMorrow. I might also want an opportunity to cross-examine On those, and I -- it sounds to me like the only reason you're making that proposal is to get around this business of the Court of Appeals deadline. Is that a correct statement or not?

MR. LAWRENCE: If I had my preference, we would come back and take it testimonially, however, it could be argued that that would be a violation of the Court of Appeals ruling. It's hard to say. It's not, the ruling does contain some ambiguity.

JUDGE SULLIVAN: Well, I'd encourage both sides to explore this matter with the Court of Appeals particularly

Analysis of the Kent County Circuit Court
Jury Selection Process
For the Period: October 1993- October 1994
by
Dr. Michael R. Stoline
Department of Mathematics and Statistics
Western Michigan University
January 29, 1998
Updated – February 16, 1998
prepared for
Linda Borus — Chief Investigator
Michigan State Appellate Defender Office

Note 1 – The January 29, 1998, document was used in my Circuit Court testimony given on February 2, 1998, in Grand Rapids, Michigan.

Note 2 – This updated February 16, 1998 document has been prepared for two purposes: (1) to include a brief technical section (Section 7), and (2) to clarify that the 1990 U.S. Census data for Kent County, Michigan used in this report is for adults (ages 18 – 69).

Section 1: Executive Summary

This report contains an analysis of the characteristics of the 2252 people selected to serve as Kent County, Michigan Circuit Court jurors during the period: October, 1993 – October, 1994. This list of 2252 jurors was compiled from returned questionnaires sent to randomly selected names from the lists provided by the Office of the Michigan Secretary of State. The list of 2252 jurors is a pooled list from eleven distinct samplings for each of eleven consecutive four-week periods (labeled terms) in this period.

Statistical analyses were performed comparing composition characteristics of this sample of 2252 to those adults with ages in the range: 18-69 in Kent County was 322,383 which was comprised of 89.86% White residents and 7.28% Black residents.

Two conclusions can be drawn from the statistical analysis described in this report:

(1) A larger than expected proportion of the 112 census tracts in Kent County are biased with either an over-representation of jurors on this list of 2252 jurors, and

(2) The biased census tracts containing relativity few Black residents tend to be over-represented on the jury list, and the biased census tracts containing relatively more Black residents tend to be under-represented in the list of 2252 jurors.

This analysis supports the overall conclusion that use of this list of 2252 jurors could lead to under-representation of Black residents serving on Kent County Circuit Court juries in this period.

Three summary estimates of the magnitude of the under-representation of Black residents on the jury lists are:

(1) Blacks may be under-represented by about 15% on this jury list of 2252,

(2) Blacks may be under-represented in ten of the eleven terms in this period, and

(3) The under-representation of Blacks is estimated to exceed 40% for two of the terms.

Specifically, if unbiased random sampling of adults aged: 19-69 in Kent County had been employed using the 1990 Census of Kent County as a frame, one would expect 164=2252*(.0728) Blacks on the jury list.

However, only 139 Black jurors are expected to have been actually selected to this list using the existing jury selection process.

This estimated under-representation of Black residents is due tot eh fact that relatively fewer residents were

observed to have been selected from those Kent County census tracts containing more Black residents.

This is an estimated under-representation of 25 Black residents for 15.1% from the 164 Black residents expected to be on the list if there were no bias in the selection process used.

Details describing the background of this analysis are provided in Section 2. Statistical analysis details are given in Section 3. An analysis summary of the estimated over-representation or under-representation bias on a census tract by census tract basis is given in Table 1 of section 3, and summarized in Section 4. The issue of bias in Black under-representation on the jury list is discussed in Section 5. The estimates of the under-representation of Blacks on a term by term technical description of the statistical methods used in obtaining the estimates and p-values reported in this document.

Section 2: Introduction

During the fall of 1997, Linda Boris of the Michigan Appellate Defender Office talked with me by phone and asked if I would be able to examine the Kent County Circuit Court jury selection process for the 1993-1994 period Her concern was that few, if any, Black jurors were observed to have been selected or to have served in this period. She asked if I would be able to examine the jury selection process and to specifically ascertain if there existed possible statistical problems with the jury selection process in Kent County in this period with respect to selection of Black jurors.

I expressed interest in examining this process. Ms. Borus then reported that this examination would be needed by early February, 1998.

On December 9, 1997, Linda Borus sent to me a hard disk containing data regarding the composition of the Kent County Circuit Court jury lists for the period: October, 1993 – October, 1994, The data contained the census tract, term selected, and address of 2252 jurors randomly selected by use of lists provided by the Michigan Secretary of State's Office. Eleven separate lists of approximately 200 were provided, each by random selection, one for each of the eleven four-week terms in this period. The Secretary of State list is basically comprised of Michigan residents either possessing a valid Michigan Driver's License or a Michigan ID, and who also resided in Kent County during this period.

The State Appellate Defender Office also provided a data summary of the 19 Kent County U.S. Census to me. This summary contained Black population, White population, and total population census counts of adults whose ages are in the range: 18 - 69 for each of the 112 census tracts in Kent County, Michigan. This 1990 U.S. Census data is attached to this report as Appendix A.

Section 3: Analysis of the 1992-93 Kent County Circuit Court Jury Lists

Table 1 contains results of statistical examination of the 1993-94 Kent County Circuit Court Jury lists by census tract. Eleven variables are listed in Table 1. These are: N, TRACT, BLPROP, WHIPROP, POP, JURY, EXP, DIFF, P, RESULT, and REPRESENTATION. The TRACT variable contains the census tract number for each of the 112 Kent County census tracts. The N variable labels each census tract using a number between 1 and 112.

The variable POP lists the 1990 U.S. Census population of adults for each census tract. The total 1990 Kent County population of adults (ages: 18-69) was 322,383.

The BLPROP and WHPROP variables contain the 1990 U.S. Census proportions of adults (ages: 18-69) was 289,704, which comprises 89.8% of the total adult population in 1990. The total 1990 Kent County population of Black adults (ages: 18-69) was 23,476, which comprises 7.28% of the total adult population in 1990. (The numbers of adult Black and White people in each census tract are given in Appendix A.)

For reader convenience the census tract data and analyses are presented in Table 1 by proportion of adult black population from smallest (N=1) to largest (N=112), based on the 1990 U.S. Census data. For this purpose Table 1 is subdivided into three segments. Segment 1 contains the 34 census tracts with the lowest proportions of Black adult residents ranging from 0.0000 to 0.0050. Segment 1 census tracts are labeled with the variable N between 1-34 in table 1. Segment 2 is comprised of the 43 census tracks with the middle proportions of Black adult residents ranging from 0.005 to 0.05. The 43 middle census tracts are labeled with the variable N ranging between 35 and 77 in Segment 2 of Table 1. Finally, Segment 3 is composed of the 35 census tracts with the largest proportions of Black adult residents ranging from 0.05 to 0.909. The 35 largest census tracts are identified with N values between 78 and 112 in Segment 3 of Table 1.

The variable JURY in Table 1 is the total number of observed jurors selected by census tract by use of the lists provided by the Michigan Secretary of State Office. This number is obtained by adding together the eleven numbers of jurors selected in each of the eleven individual terms from each census tract.

The variable EXP in Table 1 is the total number of jurors that are expected to be selected from each census tract assuming the selection process is random and unbiased.

Unbiased means that the composition of Kent County residents on the Michigan Secretary of State's list is in the same proportions as the 1990 U.S. Census data for Kent County with respect to census tract and ethnicity distributions. Unbiased also means that the ethnicity composition of returned questionnaires is in the same ethnicity proportions as the 1990 U.S. Census data by individual census track.

The variable EXP is calculated assuming the selection process is random and the individual probabilities of selection are proportional to the 1990 U.S. Census data. As an example, the expected number of selected jurors in Census Tract 5 is calculated as: EXP = 2252*(2729)/322383=19.06 as reported in Table 1.

The variable DIFF=JURY-EXP is the difference between the observed number and expected number jurors for each census tract. For example, for census tract 5, the difference between the observed and expected jurors selected is: DIFF = 28-19.06=8.94. The interpretation of this is that there were nearly 9 more actual jurors selected from Census Tract 5 than what one would have anticipated if the juror selection process was unbiased.

Statistical p-values are reported as Variable P in Table 1 to help interpret whether the observed juror selection results are biased or not on a census-track by census-track basis. Small p-values indicate statistical significances and that there is a statistical difference between the observed and expected juror numbers that can not be explained by chance only. Large p-values indicate there is no difference between observed and expected juror numbers by census tract. (The p-values were calculated using SAS and assuming a binomial model.)

The p-values are categorized in the variable RESULT as either being non-significant with a p-value . .25(ns); significant with a p-value between .10 and .25 (s25%); significant with a p-value between .05 and .10 (s10%), and significant with a p-value ,.05 (s5%). The (ne) RESULT is indicative that the jury selection process could be unbiased and fair. The (s25%), (s10%), and (s5%) RESULT values are indicative of possible bias in the jury selection process with either too few or too many jurors being selected from the individual census tracts. The (s5%) result is stronger evidence of bias than is the (s10%) result, and the (s10%) result is stronger evidence of bias than is the (s25%) result.

Finally, the variable REPRESENTATION is used to indicate whether the census tracts found to be statistically significant (biased) in Table 1 have either too many or too few jurors. Those biased census tracts found to have too many jurors are over-represented in the selection jury list and are labeled: OVER in Table 1. Those biased census tracts with too few jurors are under-represented in the selected jury list and are labeled: UNDER in Table 1.

* * *

[Tables Excluded from Appendix]

Section 4: Examination of Possible Bias in Jury Selection by Census Tract

Table 2 below contains a summary of the results of the statistical testing providing in Table 1 tabulated by non-significance (at 25%) (unbiased) and significance (biased) at three levels: 25%, 10%, and 5%.

Table 2: Evidence of Bias and Unbiasedness in the Jury Selection Process by Census Tract					
Result		Observed		Expected	
		Frequency	%	Frequency	%
Non-significant	(unbiased)	69	61.6%	84.0	75.0 %
Significant	(biased)				
	At 25%	43	38.4%	28.0	25.0 %
	At 10%	24	21.4%	11.2	10.0 %
	AT 5%	13	11.6%	5.6	5.0%

25% level of significance results for unbiased representation

From Table 2 it can be seen that there are 69 (61.6%) of the 112 census tracts determined to be statistically non-significant. There is no evidence of bias in the numbers of jurors selected from these 69 census tracts.

25% level of significance results for biased representation

From Table 2 it can also be seen 43 (38.4%) census tracts had significant evidence of bias (observed at least at a 25% level of significance) in the number of jurors selected. Under unbiased random sampling one would expect 112*(.25)=28 census tracts to be biased at a 25% level of significance. The observed number of 43 biased-census tracts exceeds 28. This provides evidence of bias in this jury selection process.

10% level of significance results for biased representation

For the 10% level of significance results in Table 2, there are 24 (21.4%) of the census tracts showing bias at a 10% level of significance. Again, under unbiased sampling,

one would only expect 112*(.10) – 11.2 census tracts to be biased by chance alone. The observed number of 24 biased census tracts exceeds 11.2.

5% level of significance results for biased representation
Furthermore, from Table 2 it can be seen that 13 (11.6%) of the census tracts show statistical evidence of bias at a 5% level of significance. Under unbiased random sampling, one would expect only 112* (.05)=5.6 census tracts to be biased at a 5% level of significance. The observed number of 13 biased census tracts exceed 5.6, which provides further evidence of bias in the jury selection process.

Conclusion about biased representation
From an examination of Table 2 it is concluded that there is significant evidence that biased numbers of jurors (either too few or too many) are being selected from many of the 112 census tracts when compared to the 1990 Kent County Census Tract data.

Section 5: Examination of Possible Bias in Selection of Jurors Related to the Proportion of Black Adults in the Census Tracts
The discussion in Section 4 indicated evidence of bias in the selection of jurors in 43 of the 112 census tracts at a 25% level of significance. We now examine more closely these 43 census tracts, and explore whether there is evidence that too few jurors may have been selected from those census tracts containing relatively more adult Black citizens or that too many jurors may have been selected from census tracts containing relatively more adult White residents.

The variable REPRESENTATION in Table 1 is conveniently used for this purpose. Table 3 contains a summary of occurrences of OVER (over-representation) and UNDER (under-representation) results associated

with the 41 biased census tracts identified in Table 1. It can be seen from Table 3 that 18 of the 43 biased census tracts are biased because of over-representation and that the remaining 23 are biased because of under-representation.

Table 3 also provides a summary breakdown for each of three subgroups of census tracts determined by the proportion of adult Black people residing in the census tract according to the 1990 U.S. Census. These subgroups are: Low (census tracts with less than 0.5% adult Black residents), Middle (census tracts comprised of 0.5%-5.0% adult Black residents), and High (census tracts with more than 5% adult Black residence.

Table 3: Evidence of Bias Associated with the Proportion of Adult Black Residence Per Census Tract

		REPRESENTATION		
		Biased		Unbiased
Adult Black Proportion in Census Tract	Number of Census Tracts	OVER (Over-represented)	UNDER (Under-representation)	NS (fairly-represented)
<0.005 (low)	34	13	5	16
0.005-0.05 (Middle)	43	5	8	30
0.05-0.906 (High)	35	0	12	23
Total	112	18	25	69

Representation of Census Tracts with Low Black Adult Proportions

Table 3 shows that 18 of the 34 census tracts with a low (<.5%) adult Black population proportion show evidence of bias, and that 13 of these are over-represented and 5 are under-represented on the jury list. This provides evidence that the 33% of census tracts with the smallest

proportions of adult Black residents show more evidence show more evidence of over-representation than under-representation on the jury list.

Representation of Census Tracts with Middle Black Adult Proportions

Table 3 shows that 13 of the 43 census tracts with a medium (0.5% - 5.0%) level of adult Black population proportion show evidence of bias and that 5 of these are over-represented and 8 are under-represented on the jury list.

Representation of Census Tracts with High Black Adult Proportions

Table 3 reveals that 12 of the 35 census tracts with a high (>5.0%) Black adult population proportion show evidence of bias, and that 12 of these are under-represented and 1 is over-represented on the jury list. This provides evidence that the 33% of census tracts with the largest proportions of Black adult residents show much more evidence of under-representation than over-representation on the jury list.

Overall Conclusion regarding Representation of Blacks on the Jury List

The overall conclusion is that use of this list of 2252 jurors could lead to an under-representation of adult Black residents serving on Kent County Circuit Court juries in this period.

The rationale for this conclusion is that there is a strong tendency for the biased census tracts wit the largest proportions of adult Black residents to be under-represented on the jury list. Likewise, there is a tendency for those biased census tracts with the smallest proportions of adult Black residents to be over-represented on the jury lists.

Section 6: Estimation of the Number of Blacks on the Jury List

If true random sampling occurred according to the ethnicity proportions contained in the 1990 U.S. Census for Kent County, one would expect:

2023.6=2252*(.8986) Whites, and
163.9=2252*(.0728) Blacks

To be selected and on the jury list of 2252. These are the numbers one would expect assuming the ethnicity composition of the returned questionnaires is identical to ethnicity composition of the 1990 U.S. Census for Kent County adults.

Given the observed biased results described in Sections 4 and 5, one would actually expect fewer Black on the jury list than those estimated above. This expected under-representation of Black residents is because of the anticipated under-representation of jurors from the census tracts with the largest proportions of Black adult residents.

Table 4 contains an estimate or the expected numbers of Black citizens to have been selected in each or the six jury term list selections. Table 4 also contains a tabulation of the combined total of these 11 terms. These estimates are calculated based on the observed frequencies of jurors selected from each of the 112 census tracts as contained on the summary of the jury list provided in Table 1. These estimates are also made assuming the ethnicity composition of the questionnaires returned (after being selected from the Michigan Secretary of State's list) is identical to the ethnicity pattern in the 1990 U.S. Census for each of the 112 individual Kent County census tracts for adults.

Table 4: Expected Number of Black Jurors by Term				
	Expected Number of Blacks (no Bias assumed)	Estimated Actual Expected Number of Blacks (bias assumed)	Estimated Difference = (no bias) – (bias)	Estimated Percentage of Over or Under-representation Of Blacks
1	16.0	20.2	4.2	26.3% over
2	16.2	15.5	-0.7	4.3% under
3	17.5	10.3	-7.2	41.1% under
4	12.4	10.1	-2.3	24.9% under
5	15.4	8.7	-6.7	43.5% under
6	13.7	11.1	-2.6	19.0% under
7	14.2	13.0	-1.2	8.5% under
8	13.7	12.1	-1.6	11.7% under
9	13.8	11.1	-2.7	19.6% under
10	14.1	14.0	-0.1	0.7% under
11	17.1	13.3	-3.8	22.2% under
Combined Total	164.1	139.4	-24.7	15.1% under

Expected Composition of Blacks on the Individual Term Jury lists

From Table 4, it can be seen there is an expected under-representation of Blacks on ten of eleven term jury lists. Only for Term 1 is there an expected over-representation or Black jurors. For Term 3 the expected under-representation of Blacks exceeds 40%. These two terms present the most severe examples of expected under-representation of Backs on the jury lists.

Expected Composition of Blacks out the combined Jury Lists

From Table 4, it can be seen that 139.4 blacks are estimated to have been selected to the jury list, which is based on the anticipated bias resulting from use of the actual jury selection method. This is an under-representation of nearly 25 Blacks (or 15.1%) from the 164.1 Blacks expected to be on the list if there were no bias in the selection process used.

Section 7: Technical Statistical Analysis Details

Calculation of probabilities reported in Table 1

A binomial sampling model (sampling without replacement) was assumed in calculating the probabilities reported in Table 1. A standard normal model was then used to approximate the binomial probabilities reported in Table 1.

This method is illustrated for obtaining the p-value of 0.03983 reported in Table 1 for Census Tract 5 (N=1). The actual 1990 proportion of Kent County adults living in Census Tract 5 was p(act)=2729/322383=0.008465. The observed proportion of jurors is selected from Census Tract 5 in the 1993-94 period is p(obs)=28/2252=0.012433. A standard normal approximation z-value for determining if the true proportion selected from Census Tract 5 to the 1993-94

juror list differs (two-sided) from the actual 1990 U.S. census value of p(act)=0.008465 is:
Z+(0.012433-
0.008465)/((0.008465)(0.991535)/2252)1/2=2.055.

The two-sided p-value associated with z=2.055 obtained from standard normal tables is p-value = .0399. (Using the SAS cdf yields a p-value = 0.03983 for this census tract.)

Sources differ in their recommendation as to when the normal approximation is valid. Devore's text (Probability and Statistics for Engineering and the Sciences – Fourth Edition, p 328) recommends the criteria that: n*p(act)>5 and n*(1-p(act))>5. In our example, this criteria is met because: n*(p(act)=2252(0.008465)=19.06 . 5 and n*(1-p(act)) = 2252*(.991535)=2232.9>5.

A hypergeometric model (sampling without replacement) would have been used if the actual numbers of adult citizens living in each of the census tracts had been known in the 1993 period, when the jury list lists were selected. Exact 1993 Kent County adult population totals would be needed by census tract in order to properly use the hypergeometric model. Using the 1990 adult Kent County U.S. Census Tract data for this purpose did not seem appropriate. Hence, the binomial model seemed more appropriate since exact population totals are not needed for the binomial model.

Calculation of the Expected Number of Black Jurors

As was stated in Section 6, the expected numbers of adult Black citizens to have been selected to the 1993-1994 juror lists are calculated assuming the ethnicity composition of the returned questionnaires is identical to the adult ethnicity composition reported in the 1990 U.S. Census for Kent County.

This calculation is illustrated for Census Tract 11.01 (N=100) in Table 1. The adult Black proportion of citizens residing in this census tract in 1990 was BLPROP = 0.27093. Also, as reported in Table 1, the total number of jurors selected to the jury list in the 1993-94 period was 24. The number of adult Black jurors expected to be on this list from Census Tract 11.01 is

6.50232=(0.27093)*(24).

Similar calculations can be made for the 111 other census tracts. (None of these estimated values are reported in this document.)

Adding together these 112 separate census tract estimates yields the estimated number of 139.4 adult Black jurors expected to be on the 1993-1994 jury list, as reported in Table 4.

Calculation of Expected Numbers of Black Jurors by Term

These expected value calculations were also made for each of the 11 terms for each census tract. Table 5 illustrates these expected value calculations for Census Tract 11.01 (N=100) as an illustration.

Table 5: Illustration of the Calculation of the Expected Number of Adult Black Jurors to the 1993-1994 Jury List from Census Tract 11.01		
Term	Number of Jurors Selected in each Term	Expected Number of Adult Black Jurors
1	5	1.35463=5(0.27093)
2	2	0.54185=2(0.27093)
3	4	1.08370=4(0.27093)
4	3	0.81278=3(0.27093)
5	1	0.27093=1(0.27093)
6	1	0.27093=1(0.27093)
7	2	0.54185=2(0.27093)
8	1	0.27093=1(0.27093)
9	3	0.81278=3(0.27093)
10	0	0.0000=0(0.27093)
11	2	0.54185=2(0.27093)
Total	24	6.50232=24(0.27093)

As an example, in Term 7 there were 5 jurors selected to the jury list from Census Tract 11.01. It is then estimated that there should have been 1.35463=5(0.27093) adult Black jurors selected in the Term 1 selection. Similar calculations are reported in Table 5 for the other 10 terms.

Adding together these 112 separate estimates yields the estimated numbers of adult Black jurors expected to be on the 1993-94 jury list for each of the six separate terms, which are reported in Table 4.

Appendix A 1990 U.S. Census Data

Attached as 1990 U.S. Census data for adults (ages: 18-69) in Kent County, Michigan by census tract. Included are White population totals and Black (BK) population totals for each of the 112 census tracts.

* * *

[Tables excluded from Appendix]

STATE OF MICHIGAN
17TH JUDICIAL CIRCUIT COURT (KENT COUNTY)

THE PEOPLE OF THE
STATE OF MICHIGAN
-v- Case No. 92-60735-FH
DIAPOLIS SMITH,
Defendant.
_____/

THE PEOPLE OF THE
STATE OF MICHIGAN
-v- Case No. 93-63788-FH
ROBERT PALMER,
Defendant.
_____/

PROCEEDINGS
BEFORE THE HONORABLE PAUL J. SULLIVAN, CIRCUIT JUDGE and THE HONORABLE DENNIS B. LIEBER, CIRCUIT JUDGE
Grand Rapids, Michigan - Monday, April 27, 1998

APPEARANCES:
For the People:
MR. TIMOTHY K. McMORROW (P25386)
Assistant Prosecuting Attorney
416 Hall of Justice, Grand Rapids, MI 49503
(616) 336-3577

For Defendant Smith:
MR. JAMES S. LAWRENCE (P33664)
Attorney at Law, One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189

[Page 1]
SHARON M. SWEET, CSR, RMR, CRR - OFFICIAL COURT REPORTER

[Page 2]
APPEARANCES (Cont'd):
For Defendant Palmer:

MS. CORINNE BECKWIITH YATES (P47463)
State Appellate Defender Office
340 Business and Trade Center
200 Washington Square, North
Lansing, MI 48913
(313) 256-9833
REPORTED BY:
Sharon M. Sweet, RMR, CRR, CSR-2318
Official Court Reporter
272 Hall of Justice
Grand Rapids, MI 49503
(616) 336-3656
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Grand Rapids, Michigan
Monday, April 27, 1998 -1:45 p.m.

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JUDGE SULLIVAN: Good afternoon, everyone. I'm here with my very good friend and colleague, Judge Dennis Leiber, for a joint hearing ~~ continuation of a joint hearing on the matter of the People of the State of Michigan versus Diapolis Smith, which is file 92-60735-FH, a case to which I am now assigned, was previously handled by my predecessor, Judge Michael Smolenski, and the matter of the People of the State of Michigan

versus Robert Palmer, File 93-63788-FH, to which, again, my colleague, Judge Leiber, is the assigned judge. And these two matters were remanded to the Court here for a joint hearing dealing with questions involving jury selection process here in Kent County, relative to these two cases.

We previously took testimony on Monday, February 2nd, 18 1998, we were unable to conclude the hearing at that time due to the fact that the defendant appellants wished to produce some additional testimony, get some additional evidence, and possibly the People, appellees, wanted to as well. So the matter was put over until today.

We're here to continue on the case, and on behalf of the People appellee is Mr. Timothy McMorrow, chief appellate attorney with the Kent County Prosecuting Attorney.

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Mr. James Lawrence appears on behalf of defendant appellant Mr. Smith, Ms. Corinne Yates appears on behalf of defendant appellant Mr. Palmer.

Before we proceed, I understand there's a matter involving presence of your client, Mr. Smith.

MR. LAWRENCE: Obviously my client--

JUDGE SULLIVAN: Mr., Lawrence, I'm sorry.

MR. LAWRENCE: --isn't here. I'm prepared to waive his presence at today's hearing. The nature of the issues is such that I don't believe that his presence would add a lot to the proceedings. Certainly he'd prefer to be here, and if we happen to come back again, I'll certainly ask for that, but I don't see any reason why we can't proceed today.

JUDGE SULLIVAN: Thank you.

JUDGE LEIBER: Ms. Yates?

MS. YATES: My client actually asked not to be present, and I do have an affidavit waiving his right to be present at the remand hearing, which I have given a copy to the prosecutor.

JUDGE LEIBER: I'll receive it

JUDGE SULLIVAN: And I'll simply go by your representation as an officer of the Court here, Mr. Lawrence, that you see no problems proceeding and are in a position to be able to waive your client's presence.

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MR. LAWRENCE: I believe so, your Honor.

At this time 1'd like to have marked two exhibits. I have a set for each file, each judge, One of the exhibits is a report of Dr. Stoline, S-t-o-l-i-n-e, which is originally dated January 29th, 1998, and it says "Updated February 16th, 1998." This is a revised version of the original report submitted last time, covering the period October of '93 to October of '94.

I believe, if my count is right, that would be Exhibit G.

Then the next exhibit would be a report of Dr. Stoline dated April 23rd, 1998, and this covers the year for which we previously did not have any data, being specifically April of '93 to October of '93. That second report that covers the earlier year would involve a period of time when Diapolis Smith's jury was selected.

So what I would like to do is have the court reporter mark these and deliver one to each judge so -- these two would be Exhibits G, and these two would be Exhibits H.

JUDGE SULLIVAN: Mr. McMorrow, any objection?

MR. MCMORROW: No, your Honor, no objection. I do have copies of those.

JUDGE SULLIVAN: Ms. Yates?

MS, YATES: I concur.

JUDGE SULLIVAN: We'll receive G and H at this time.

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(Exhibits G and H were marked for identification)

MR. LAWRENCE: Now, at this time, your Honor, I would propose to call Dr. Michael Stoline just for some

short questioning concerning the new data and any conclusions that he may have reached from that that may bear light on the matter at hand,

JUDGE SULLIVAN: All right, very well.

JUDGE LEIBER: Could we have my exhibit marked and stamped and received?

JUDGE SULLIVAN: I tried to get her in here. I'll see if Donna can come in.

Hold on just a minute. You can have a seat, though.

Sandy, there's an exhibit --not an exhibit, but a document for Judge Leiber's case he'd like stamped and received, if you could do that.

THE CLERK: I sure will.

JUDGE SULLIVAN: Then bring it back in.

Sir, would you state your name and spell it for us, please?

DR. STOLINE: Michael R. Stoline, last name is spelled S-T-O-L-I-N-E.

JUDGE SULLIVAN: You want him resworn?

You were placed under oath when you were here before, is that correct?

DR. STOLINE: That's correct

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JUDGE SULLIVAN: And you're still under oath at this time, if I just remind you of that.

DR. STOLINE: Okay.

JUDGE SULLIVAN: And you may proceed, Mr. Lawrence.

MR. LAWRENCE: Thank you.

DR. MICHAEL R STOLINE

recalled as a witness at 1:52 p.m., having been previously duly sworn, was examined and testified as follows:

REDIRECT EXAMINATION

BY MR. LAWRENCE:

Q Dr. Stoline, are yon the author of these two reports which we just admitted as Exhibits G and H in this matter?

A Yes, I am.

Q All right. Now, you previously testified regarding the period of October '93 to October '94, and we submitted a report from you earlier, and now we have an updated report from you dated February 16th of 1998, and I'm wondering if--what are the differences between the report we submitted earlier and the one that was updated February 16th?

A At the bottom of the first page of the updated report, which is dated February 16, it says, under Note Two, that there are really two items that have been added to the updated report that were not included in the January 29, 1998 report, and one was the need, I felt, to add a brief

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technical section, which is Section Seven, so that's included in the February 16th report that's not in the January 29th report.

And also to clarify that the census data for Kent County used in this report is for the adults aged 18 through 69. That point was not clear in the original January 29 report.

Q. Now, with respect to this period of October '93 to October '94 that is involved with Exhibit G, did you change any of your conclusions?

A Conclusions were not changed.

Q All right. Now, I would like now to call your attention to Exhibit H and the report that you made dated April 23rd of 1998, for the period April of 1993 to October of 1993, and I just --just to go back to the first report a moment, you indicated last time in that report that there was approximately a 15.1 percent under-representation of blacks during that year. I'm wondering if you can tell us what the figures were for this earlier period of April '93 to October '93?

A Okay, one thing about that 15 percent, it's an estimated amount, it's not from any actual figures, It's based on techniques of estimation.

What we estimated in that period from October '93 to October '94 was 15 percent; in this period from April '93

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to October of '93, that number is 18 percent, so we estimate that blacks may be under-represented by 18 percent.

Q Okay. Now, I would like to call your attention to Table 4 on Page 13 of the April 23rd, 1998 report, Exhibit H?

A Yes.

Q And I notice that in the left-hand column you have certain numbers, 7, 8, 9, 10, 11, and 12. And I'm wondering if you can tell us what those numbers represent.

A Those are the terms that --those are the --there's Term 7, 8, and so on, through Term 12, that represent the roughly four weeks of sampling that --that period April through October of 1993 was broken into six four-week samplings, and one of them was termed 7, one was termed 8, and so on, through the last one was termed 12.

Q Okay. So would you then say that Term 12 would represent September of 1993?

A I don't have that in front of me. That was presented to me by Linda Boros on the phone and I wrote that down, but I did not include that in the report and I cannot testify to that.

Q But if the new term started October 1st of 1993, and if a Period Number 12 of the preceding year were the last term of that year --well, I guess the record will speak for itself. Let me ask this question, then. During that

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Period Number 12 of the year that ends October 1st of 1993, what was the amount of estimated under-representation of blacks that you found?

A Well, the percentage was 34.8 percent, that we would estimate would be the under-representative proportion of blacks, that blacks would be under-represented by a proportion roughly 34.8 percent.

Q And that was substantially more under-representation than you found to be the average, is that correct?

A When you look at the combined figure, I don't know that I would call that an average, but when you look at the combined figure which pools together the data over all six of those periods, that is 18 percent. So you--the estimate is that blacks would be under-represented by 18 percent over the combined period, but in this one-month segment or one-month term, Term 12, it turns out that the estimation is that it's 34.8 percent under-represented.

JUDGE SULLIVAN: If I can just interrupt you there for a minute. Just so I understand, on that time frame, that 34.8 percent suspected under-representation would equal approximately three to four fewer blacks than you would have expected?

THE WITNESS: We would--if we could assume that the sampling process was unbiased, we would assume that--we calculate that roughly 18.5 blacks would be selected to the

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juror lists in that term, Term 12. But using our method of estimation based --with the analyses from Table One, it turns out that since there is a, a bias in the selection of jurors from the different 112 census tracts in Kent County in that period, it turns out that using that same estimation model, we would estimate that roughly 7.5 blacks would actually be selected to the lists in that term. So subtracting 7.5 from 11.5, yields four, or minus four in this case, so we would estimate that there would

be four fewer blacks selected in that term than one would expect if random sampling --or, let's put it this way: Random sampling, if there were no bias in the sampling process.

JUDGE SULLIVAN: Out of how many individuals total?

THE WITNESS: In Term 12?

JUDGE SULLIVAN: Yes, sir.

THE WITNESS: Are we –you're talking about the total number that were selected in that term?

JUDGE SULLIVAN: Yes, sir.

THE WITNESS: Approximately--I did not put that in my report, but I'm gonna estimate that roughly at 150 to 160 would be the numbers that are selected per term, so we would expect--now, I don't have that –I just did not include that in this report.

The total number selected, when we add together the total numbers over all six terms, there were, I believe,

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929 jurors selected, when we add together the selection process over all six terms, so roughly 150 per term.

JUDGE SULLIVAN: Thank you.

I'm sorry, Mr. Lawrence.

MR. MCMORROW: Your Honor if I could just--I think Dr. Stoline misspoke himself, then corrected himself, but this might be the time--he said at one time expected 18. 5 black jurors, then restated 11.5. I think that was a misstatement. I wanted to check that to be sure if that's correct.

THE WITNESS: Tell me, where did I say that?

MR. MCMORROW: At one point I thought I heard you make a comment that you thought that there should have been 185 black jurors for Term 12. Later you--later Dr. Stoline did say 11.5.

THE WITNESS: I didn't mean 18.5, it's 11.5.

JUDGE LEIBER: My notes reflect the witness did testify 18.5 blacks would be the total number in Term 12,

but now you're telling me, as the chart indicates, the total number of blacks expected was 11.5.

THE WITNESS: Exactly, it should be--what meant to say was what is in the report, 11.5, and I'm sorry I said 18.5.

JUDGE LEIBER: All right. And now just to go back, then, with that figure, so that I can understand your

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answer to Judge Sullivan, if in Term 12, 11.5 were the number of blacks, no bias assumed, in your chart, and if the rest of the data is as indicated at Term 12, how many people, black people specifically, equals the 34 percent under-representation that you concluded?

THE WITNESS: It would be four divided by 11.5.

JUDGE LEIBER: All right.

THE WITNESS: Is how I calculated the 34.8. And since it's a minus number, it's under. So it's minus four, so meaning --

JUDGE LEIBER: Okay, thank you.

JUDGE SULLIVAN: But you're basically saying--I don't mean to over-complicate this --if there'd been four more blacks on that particular panel, or Number 12, month 12, or whatever that refers to there, then it would have been a proper representation, an appropriate representation, using the procedure you're outlining here today?

THE WITNESS: That is correct. If that--what we're looking at are the data in that third column that is the estimated actual expected number of blacks, bias assumed. If that number were four larger than what it is, and it's 7.5 in the table, but if we add four to that and it's 11.5, if we added four to that, then there would be no either over or under-representation of blacks in that particular

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term, which is Term 12.

JUDGE SULLIVAN: All right, thank you.

BY MR. LAWRENCE:

Q Now, Doctor, turning for a moment to October '93 to October '94, in the 15.1 percent under-representation figure, did you find that to be a statistically significant figure?

JUDGE LEIBER: Excuse me, Counsel, where are we here?

MR. LAWRENCE: Okay, I am now going back to Exhibit G just for a moment, Table 4, Page 12.

JUDGE LEIBER: Just a moment, please.

THE WITNESS: Umm.

JUDGE LEIBER: Exhibit G?

MR. LAWRENCE: Page 12.

JUDGE LEIBER: Page 12. All right, thank you.

BY MR. LAWRENCE:

Q Table 4, combined total, the last figure, 15.1 percent?

A The 15.1 percent under-representation in that period is--you asked if I found that to be statistically significant. I did not—I did not do a statistical test to judge to see if this were statistically different from zero. The test that you would use here would be--I mean, if there were--if everything were proper here, your estimate would be that there would be a zero percentage under-representation, or a zero percentage over-representation.

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So the estimate here is 15.1 percent under-representation for this period, which is October of '93 to October of '94, and then--but I did not do anything statistical with that to do a statistical test to essentially judge whether in fact that is statistically significant.

Q All right. Now

A What I did, the purpose of this was simply to report to you some descriptive statistics that--what my hope is that this will be useful for you to judge for yourselves about the process that you've used in composing your juries in these two periods.

Q Now, turning back to Exhibit H, the six-month period, April '93--

A Yes.

Q --and turning to Term 12 –

A Yes.

Q --you have 34.9 percent estimated under-representation. Is it fair to say that the under-representation is, assuming you consider under-representation to be bad, that the under-representation is more than twice as bad in Term 12, of the period April '93 to October 1st of '93, than it was in the entire following year? In other words, the 34.8 percent under-representation is more than twice the level of the 15.1 under-representation for the year of October of

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'93 to October of '94; is that correct?

A Yes, it's more than twice as much. Again, I think that's a judgment that I can't make as a statistician. I think we have to together make that judgment. I mean, meaning that it--I don't know the way, unless you give me some criteria for me to answer that question properly so that I know whether in fact that is a significant departure.

But to answer your question, in a way, it is, the 34.8 percent under-representation that we have for that Term 12 is more than twice as much as that 15.1 percent that you were talking about in that Table 4 from that other period. So it is more than twice as much. Now, whether --I can't go any further than that statistically until we really talk more about the criterion which we make a judgment about this.

Q Now, when you wrote this report, Exhibit H, April 23rd of '98--

A Yes.

Q --you had more information than when you testified previously, and I'd like to ask you if the additional information that you have changes any of your conclusions other than as to amounts?

A Well, what we have here are two separate reports, one is over roughly a one-year period, the other is over roughly a six-month period, I assume these are kind of consecutive

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periods. My feeling is--I don't have an analysis here that pools both of these results together. But I think--is that the question that you're asking, what would happen if we were to put these together, or --

Q Well, what I'm asking is, are any of the conclusions that you drew last time, are any of those conclusions changed by the new information that you have?

A The conclusions from this current report are essentially very, very consistent with the conclusions that we had before. That is, that there seems to be an under-represent--the possibility of under-representation of blacks in the composition of the Kent County jury lists in both periods of time, and the essential cause, in my view, from the analyses reported in Table 1, is that there's a tendency for more jurors to be selected from those Kent County census tracts that contain more proportionate white adults and fewer jurors selected from those Kent County census tracts that contain relatively fewer adult blacks, and that—there's a Table I describing that process for both periods of time here.

And to answer your question, the results from Table 1, from the one-year period, and results from Table 1 in that other six-month period, the more recent one we've analyzed here, they are very consistent, the results are very consistent.

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MR. LAWRENCE: All right, thank you, I have no further questions.

JUDGE SULLIVAN: Ms. Yates?

RECROSS-EXAMINATION

BY MS. YATES:

Q Just one quick question, it's sort of along the lines of the question you were just answering. I wonder if you're capable of saying whether your conclusions from the first report are stronger now that you have a larger sample of looking at six additional terms?

A I think that if we were to do another analysis here not--another analysis-we've done all the analyses, but if we were to do another report, which would be a third report, which would combine the results from these two periods, I think the--two things. First of all, the results, or the conclusions would be the same. Second of all, I think the conclusions would be somewhat stronger.

In other words, I think there would be relatively more evidence that there's more jurors relatively comes from the census tracts in Kent County that have more white adults and fewer --that's my feeling. I've done the analysis, I've not written the report. Now, for me to go any further than that to give you numbers on that, how much stronger, I cannot do that until I really get into detail, But I have a strong sense that if we were to combine these two

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together, it would be a more powerful report, in the sense that the conclusions would be more pow--there does seem to be--there would be stronger evidence here of this, the conclusion that blacks are under-represented because of the way that the juror lists were drawn, using the sampling technique.

MS. YATES: Thank you. I don't have any further questions.

JUDGE SULLIVAN: Mr. McMorrow?

RECROSS-EXAMINATION

BY MR. McMORROW:

Q Dr. Stoline, bear with me just a second here. Let me see if I'm remembering my mental algebra correctly or not. Exhibit H is the report for the April-October '93?

MR. LAWRENCE: Yes.

Q Okay, and Page 13.

A Which report are we—
Q This is the April to October '93 report.
A Page 13, okay.
Q Now, I believe that the percentage of black potential jurors was based upon the percentage of population, was .0728, is that the figure that was used, I believe?
A That's the percentage of adult blacks in Kent County in 1990, age 18 through 69, according to my calculation.
Q So if we were to take, let's say, a thousand black jurors
[Page 21]
at random--excuse me, not black jurors, a thousand jurors at random, randomly selected, you would expect 1,000 times .0728, or 72.8 potential black jurors, out of a thousand, assuming no extraneous factors or anything else, all other things being equal?
A Right.
Q Okay, so let me see if I'm doing this correctly. To know the number of jurors, for example, in Term 12, you expect 11.5 black jurors out of a total number of X jurors that 10 would be selected in total, and you expect that figure to equal .0728.
A Yes.
Q So if I wanted to know the number of jurors, would I therefore divide 11.5 times .0728?
A Yes.
Q I had to ask that to see if I remembered my algebra correctly.
A What that is, that number would be the number of jurors that are selected in Term 12.
Q Yes.
A And I did not--I did not make that part of the report.
Q Well, when I, very quickly with a calculator, do it this 23 way, I come up with 157.96 total jurors, and that would be about right—

A I had testified a little earlier the numbers were
[Page 22]
between 50 and 160, yes.
Q Okay. So if 150 to 160 would be, at 11.5, be expected, 7.5 is the actual expected numbers, now, that 7.5 is based upon where the jurors came from census tracts?
A That's right.
Q Okay. So essentially what that was, was all of your data from Table-
A One.
Q --One, but except as presented for the whole term, presented for just that particular month?
A Got that.
Q All right?
A I mean, I should say, that's right I don't mean to use slang here. And I decided not to put that detail into this report, because it's, for each term, to have a Table 1 for each term, but really to be able to do--to reproduce these calculations, if you were to try to reproduce the calculations in Table 4, you would need that data, you'd need a Table 1 for Term 7, you'd need a Table 1 for Term 8, so on, you'd need a Table 1 for Term 12, to reproduce this, and I've not provided that in this report.
Q Now, I believe that Ms. Yates asked you the question about whether the additional report makes your conclusions stronger. Would it be fair to say that the larger the base that you're working with, the larger amount of raw data
[Page 23]
that you have is--as a statistician, you would consider it more significant if you--your conclusions would be stronger the larger the data that you have?
A I think that it's more than that. I've looked actually at the data, looked at those results, and actually there are, when you do the summary statistics on this it just turns out that there's stronger evidence that there's --I think there will be stronger evidence that there's an

under-sampling or an under –under-sampling of jurors from the census tracts that contain relatively more blacks, those one-third census tracts that have the largest proportion of blacks. I think if you combine those groups together, that the actual numbers that we report in these various tables will be larger, and I don't think it's a function of the sample size, it's just the way things turn 16 out.

Q Would it be fair to say that the--if you had one month's data, you wouldn't feel as comfortable about a conclusion as if you had 12 months' data?

A I hate to be argumentative here, but it depends, it depends on the information content in that one month. That one month data could be just so overwhelmingly powerful that even though it's based on a small sample size, it's just very convincingly strong that, say, there's a problem, there's a bias. It all depends, to tell you the truth, on

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what is really the nature in that one month.

If that one month is very unusual, and it's--meaning that you have a large bias in that month, and you've got a small sample, but you're--it could be that the conclusion that you draw from that one month could be more powerful than that conclusion you draw from more data, even though that one month is part of that 12-month data. It's just one-twelfth of the data that you're summarizing over --for your total. So—

Q What you are saying--

A But basically—I'd like to say yes to your comment, but I have to be careful.

Q If I understand what you are saying, extreme data may be significant because it's extreme?

A It depends on the underlying--we have to say more than what you're saying for me to, to say yes to your comment. I have to be careful in commenting--if everything else is equal, okay, everything else is equal, meaning that if this one-month period is kind of

representative of the full 12-month period, and we have homogenous--there's a homogeneity as you go month one, month two, so on, to month 12, then I think I would buy into what you are saying, that if you essentially take, I don't know, 150 observations from month one, then put that together with 150 observations from month two, and put it all together over

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12 months, and you end up with, what, 1800 observations or so, then I think you can make a more powerful statement about whatever you're trying to make a statement about.

It may be there's nothing going on there, may be that--when I say nothing going on, it may be that there's no bias in there whatsoever, but it would be a more powerful conclusion, because you have more data, over a longer period of time, too.

Q Now, as with Tract 12 on Page 13 of Exhibit H, there was an estimated difference of four, shortfall four potential black jurors. If we had a situation where the number of jurors we're looking for, there were no bias of any kind shown in the data, would you find it statistically significant that in one month there were four jurors short of black jurors?

A I can't answer.

Q Am I expressing that correctly? Do you understand my question?

A Yes. It could be. But I don't know. I did not do that analysis.

Q I think--

A And it would be hard to do that analysis here, in a way, because these are--these are estimated biases here, I mean, they are not based on raw data. Meaning that we really don't know much about the jury composition, or the

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composition of these juror lists, as far as ethnicity or gender or age. All we know, really, is where they live.

So we can--that's one piece of --it's the only piece of information we're dealing with, which is our census tract, so that's the only thing we know, whether it's through 112.

Q So to take, for example, from Tract 18, which has an extremely small black population--

A Okay, are we in the April 23 report?

Q Excuse me, yes, the same report.

A Okay, Table 1.

Q Page 7, Table 1.

A Okay. And we're looking at 18.

Q 18. That is the first --the first 17 have a black population of zero?

A Yes.

Q And Number 18, there could be one black person living in that census tract, and by random chance, they could have been the one that was picked as the juror, and your --you, statistically, you couldn't say that that's an impossibility?

A Right.

Q You're basing this upon the estimation, through all of the census tracts, in terms of numbers that have been picked. That is, for example, you are, as you go through each of

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these tracts, you are assuming that every juror is, for that one particular tract, is .000362 black. I understand, statistically, you have to do it that way, but what you are telling me is you're not basing it on raw data, you're basing it on estimations from the number jurors picked from every census tract and--

A I'm basing it on the number of jurors that are selected from each census tract, and also, we know one other piece of information, which is the term in which they were selected, too. So those are really the two pieces of information we know.

Q Okay.

A And the other thing that we're doing is just kind of comparing these characteristics theoretically with what we would expect, if in fact this were done in a way that would mimic the 1990 census composition of adult populations in Kent County.

Q Now, the last time you testified I asked this question; I want to clarify this. You used the term "bias." And by "bias," if I understood you correctly, what you meant was just --you were referring to the result, using the term "bias." For example, you have no knowledge as to what might cause the shortfall? You have no personal knowledge in terms of if there is a--the estimated shortfall of black jurors, what would cause that?

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A No. I'm using two pieces of information here, I'm using the actual number of jurors that we know were selected in each census tract, so we know those 112 numbers, and then we know also the--well, we know the census, the census population of those census tracts in 1990, and then we also know the--well, when I say the census population, I mean the adult census population, and then we know the proportion of those that are black and white. So we then use methods of estimation to compose or to estimate the number of black jurors that we would expect, if in fact random sampling had occurred here, or there were no bias in the process of selection.

Q Now, I hate to put this this way, but I'm going to have to ask you to bear with me.

Q I want to ask a question, I'm not sure if this question is--how valid this is, but I've heard the term used before in statistics, the Texas sharpshooter effect. Have you heard that term before, familiar with that term?

A I may have. I'm not familiar with it, so--

Q Well, the idea would be that a Texas sharpshooter pulls out a gun and just fires at a barn.

A At a --

Q At a barn, at the side of a barn.
A Okay.
Q Afterwards, you go and you look and you draw a target where
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most of those bullets were, more hit than others, and the conclusion is drawn that the Texas sharpshooter was shooting at that target. In fact, he was just shooting randomly, and after the fact the target is drawn. Have you, have you ever heard of another term --do you understand what I am talking about when I use that term?
A I understand the concept.
Q The question I have, and I don't really know how to ask this, except to ask it this way, is it possible there's a Texas sharpshooter effect that would be at work in data like this?
A All right, I need to ask some questions. What would be--I assume the bullets are your, in the Texas sharpshooter, let's say that there are, what, 12 bullets, or something like that, so then--what would be the bullets in what we're talking about here?
Q Well, what I'm trying to get at is—
A You need to give me--I hate to be this way, but we need to focus a little bit more on a model that we're aiming at, and I need to--I don't know whether I can help you or not.
Q What I'm getting at is this. We have drawn a conclusion from the data that has been presented, that there seems to be an under-representation of African-American jurors during both periods of time.
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A Again, I want to say that it's estimated because we don't have any actual data here, and it's based on Table 1, which really presents what I consider to be fairly powerful evidence that you are really drawing more jurors than you would expect from those areas in Kent County that have relatively larger white

populations. You're drawing fewer members of your jury, jurors, in both periods, from those areas in Kent County that have relatively fewer blacks. That comes through pretty powerfully in both Table 1 summaries that we have in both reports. That's --but it's from that pretty hard evidence that we have here, which I think is pretty conclusive, that we then estimate the effect of that, and that's what we're talking about here. And I'm trying to give--that's why I present the other information, past Table 1, and so on, to help you kind of draw some idea whether this --what is the effect of this, and that's what we're talking about here.

Back on your problem with the Texas sharpshooter, I still--if I could make the connection with this I would, but I can't.

Q Okay. There may not be one that can be made. I guess the question I wanted to ask is one which you may not be able to answer. Would it be fair to say that, as a statistician, you cannot draw conclusions as to motive behind the results? You don't know the causes as to why

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the estimated shortfall of black jurors?

A You want me to take off my statistician's hat and give you some opinions about this?

Q I'm really not sure if that's appropriate. I think we all have opinions.

A I think you've had some sociologists and other experts in here that really probably provided information about how this might have happened with respect to the frame or the Michigan State--well, the Secretary of State's list that was used in sampling, and, in these terms--

JUDGE SULLIVAN: Let me ask it another way, maybe this isn't quite the same question, but is it possible that these same figures that you have here could suggest, for example, an economic discrimination, economic bias as opposed to racial bias?

THE WITNESS: Again, I can't answer this, because I, I can only speculate. Can I just give you kind of an overview of how statistics operates? I may have done this last time, and I apologize, but I feel that the role of a statistician is to help--we work with other people, we work--if I'm working on an environmental problem, we have environmental scientists there, so we're working together as a team, and I feel somehow, even though this is a court of law that we're at here, we're kind of working as a team.

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So I'm kind of leaning on what you're telling me. It's just like a consulting situation, we're trying to get at the truth, or trying to shed a spotlight on something that's kind of hard, it's subtle. But my feeling is that there are some economic issues here, I don't know whether--and that these are related to race, or--you know, the fact that people are on the Secretary of State's lists that have automobiles. Well, what leads one to have an automobile, you know, or not, or have one registered? Well, what are those--of course, there's economic, I mean, I would think there are economic factors.

JUDGE LEIBER: Are you suggesting that blacks have a higher proportion of under-registered automobiles than anyone else?

THE WITNESS: I'm saying that could be a possibility. I don't have knowledge of that. But there could be. I mean--

JUDGE LEIBER: Could be? Is there any study? Are you simply making assumptions based upon perceptions of economic disparity between racial groups?

THE WITNESS: Am I make--okay, I have to understand that question. Did I --I don't think you said this, but I just want to clarify this. Did I make any assumptions about the economic disparity between the -

JUDGE LEIBER: Between blacks and non-blacks.

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THE WITNESS: As I made my analyses?

JUDGE LEIBER: Mm-hmm.

THE WITNESS: None whatsoever.

JUDGE LEIBER: How about just now?

THE WITNESS: I think I was asked to take off my statistician hat and kind of speculate --but I'm still a statistician in a sense, but I'm not --I'm helping come to some conclusion about what this means and why, why these--why do we have these results, what does it mean, how do they arise.

JUDGE LEIBER Okay.

THE WITNESS: And I--but to answer your question, again, I did not make any judgment whatsoever about the possible economic relationship here that may exist between blacks and whites, as to -- that had nothing to do with the results here. The results are all based on just the numbers represented here.

BY MR. MCMORROW:

Q Dr, Stoline, one thing I noticed going over this data is a little odd to me. In fact, I recall you testifying at the last hearing that there was a lot of things about this data was kind of odd. There were greater numbers, I think you thought, there were more tracts over or under-represented than you would have expected, You would have expected some by random chance, but that there were more than you would

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have expected.

JUDGE SULLIVAN, Is that a question or--

BY MR. MCMORROW:

Q Well, is that correct?

A That is absolutely correct. That we noticed the, at the previous testimony in February 2, with that previous data, and it also is a conclusion or a statement or an observation that I'd make with respect to the characteristics of this data, that there are relatively more census tracts that are either under-represented or over-represented, than--so that conclusion for that

observation is true with respect to this data set, also. And I'm trying to--I believe it's on Table 2.

Q Now, in Table 1--

A Yes.

Q --which is the one that goes through every census tract in the county, and your final conclusion of representation of over and under, that means over-representation within that census tract, is that correct?

A That's correct.

Q So that's not over-representation of black or white jurors necessarily, it's just to that census tract?

A That census tract, and that's--yeah, that is correct, the Table 1, the word "over" means that there are, we're observing more jurors, or the observed jurors having been

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selected from that census tract, than one would expect.

Q And in the result, each one of those you have where there is an over or under, you have either an S-5 percent, S-10 percent, or S-25 percent?

A That's right.

Q What did that mean?

A I did use some statistics calculating a statistical procedure to essentially make a judgment as to whether the difference between the observed number of jurors, the expected number of jurors, was significantly different from one another.

Q One would expect, then, randomly, that the number of tracts that would be 25 percent over, and the number of tracts that would be 25 percent under would be randomly --would be the same, would that be correct?

A Right.

Q Now, my quick addition in Exhibit H, which is the April to October '93, is there were three census tracts that were 25 percent over, and 15 that were 25 percent under. Now, in contrast, I count ten that were five percent over and only one that was five percent under. Is there any statistical explanation for that? I should know,

because I had this question I went down with a yellow pad and I think I got it right.

A All right, we're looking at the April 23 report, and you're

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looking at --

Q Yes, April '93 report.

A Help me out, what page are you looking at?

Q Well, on Page 7, Table I.

A Okay.

Q I notice that Tract 8 is 25 percent over. The next 25 percent over I find is on the next page, which is Tract 70, and the next 25 percent over that I find is Tract 105 on Page 9. And I find no others, and as I say, I counted 15 that were 25 percent under. It's just a curiosity. I don't know if it's explicable or not, but I wonder if there is anything you can shed light on that as to statistically-- what I am getting at is, there are fewer tracts where there are many more jurors selected than you'd expect, the 25 percent statistical significance, there are far more where you would expect a large number of jurors, you get almost none or you get a lot fewer than you would expect to get.

A First of all, the 25 percent, when I do a summary --this gets a little complex, but when I do a summary of this on Table 2, if a result is significant at five percent, it's automatically significant at 25 percent.

Q Okay.

A And if it's significant at ten percent, it's automatically significant at 25 percent.

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Q Okay.

A So those ones that you are pointing out in Table 1 that are significant just at 25 percent, that means that they are not significant at ten percent or not significant at five percent. So when I add up the numbers that are looking at those census tracts where we have either a statistical over or under-representation in that

particular census tract, I really come up with 41. So to get the 25 percent number, I add together the five percent the ten percent and the 25 percent, all of those results. And the reason I look at ten percent separately and the five percent separately is that that's even stronger evidence that there's a problem or that there's a deviation between what you observe and what you expect. So it's stronger statistical evidence.

And in fact, if you look at just the--in this particular period that you're looking at, this October 23 period, the --there are 11 census tracts that are significantly different, I mean, where the observed number of jurors is significantly different than what you'd expect, whereas if random sampling had occurred, five percent of 112 is 5.6. So there's about twice as many observed census tracts here that are significant at five percent than you would expect, if in fact there were no bias, you'd only expect maybe five or six. Again, I haven't done any statistical judgment of that, whether

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that's --but what I did, you know, in putting this table together, was notice that, gosh, that the ones that are over-represented, the census tracts that are over-represented, are from those areas predominantly that have those one-third census tracts that have more whites and fewest blacks, and so on through the table. I did not do any statistical analyses to judge whether in fact some of these results were statistically significant. I could, but I didn't as part of this report.

Q Dr. Stoline, I suspect this won't become relevant, but I'll just ask. I had consulted with a statistician, and I will advise the Court, in fact, now, that I gave the reports, the first report to the statistician and--who indicated to me that the report looked very good, wanted to see an updated report with the scientific explanations in it, and I suspect that I will have no reason to call, but I just want to inquire briefly, the statistician I consulted

was Grand Rapids Community College Cindy Woltjer. Are you familiar with her?

A How do you spell her last name?

Q W-o-l-t-j-e-r, I believe, believe that's how it's spelled.

A Yeah, I know her. I'll go one step further. She's a former student of mine.

Q That's exactly what she said.

A You might want to find another person to look at this. You I

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talk about bias, I mean --I don't mean to be flip, but she's very good, she's very good, but on the other hand, she is a former student of mine, and I think that --yeah.

Q That's the kind of bias you're talking about, you think rather than somebody who didn't know you, or anything of that nature?

A Well, I—

Q That's fine, I understand.

A I would maybe, seriously, if you want someone to take a look at this statistically, I would maybe select someone that is not a former student of mine.

Q Okay.

A She's excellent, though you really picked a nice person. I don't mean to, that's the only problem I have is that she's a former student of mine.

MR. MCMORROW: I have nothing else.

REDIRECT EXAMINATION

BY MR. LAWRENCE:

Q Dr. Stoline, I just wanted to clear up a point or two here. Now, suppose that we were dealing with, say, census tracts where the population was completely equal in each tract, okay?

A Say that again. 'Where—

Q Let's suppose for a moment that we were dealing with, say, five census tracts, all of which had exactly the same

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population.

A Okay.

Q Okay. Now, if one of those was over-represented in the jury pool by, say, 20 percent, to make it come out even, it could be one other census tract under-represented by 20 percent, or it could possibly be five tracts or four tracts each under-represented by only five percent, isn't that right?

A Yes,

Q So the percentages of over and under are not necessarily going to add up to zero. Is that right? Or let me state that differently. The percentages of those that have an extreme deviation from the norm are not necessarily always going to be balanced by the same extreme deviation in a single tract: in other words, the deviation could be spread out among a number of tracts, isn't that right?

A Yes.

Q So there's nothing in the fact that, say, you have more under-representations in the 25 percent or over range, and fewer under-representations, that doesn't demonstrate some mathematical flaw, does it?

A Not necessarily.

Q And if the census tracts were of different sizes, then you would have an even greater problem trying to make those numbers add up to zero, isn't that right?

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A Well, I guess --I'm having a little trouble trying to track exactly the problem we're dealing with. There's two issues here. We have something in statistics which is observed and then your expected, and if you look at the difference usually between observed and expected, and you assume random sampling, you add up that, the number of observed and you add up the number of expected, they sum up to the same thing. So if you look at the difference between observed and expected, observed minus expected, and then sum those over all of your selections, those sum to zero, whether you're taking

those from equal-sized units or unequal-sized units. The problem that I was speaking of here was really the estimated bias, and that's where we're saying that sampling is, I mean, where we are trying to estimate here the under-representation of blacks on these jury lists because of the problems that we've already talked about, that we've kind of categorized--that we've discussed in Table 1. And can I just --go ahead, I—

Q Okay. Well, I guess the question that I am trying to get at is this: Is it a mathematical necessity that the number of census tracts over-represented by more than 25 percent have to equal the number of census tracts that are under-represented by more than 25 percent?

A No, but--I'm not sure of the context in which I'm

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answering this question, but the answer is no, basically.

Q So if you take the example of a city with five census tracts, all of which are of equal population, and if one of them is over-represented by 25 percent, you might have none whatsoever under-represented by that amount, because they might only be represented by five percent each, or some similar amount.

A In framing this discussion, are we assuming that every --when we add all this up, the over-representation and the under-representation, that when you add all this up, it goes to zero?

Q Well, that's what I'm asking you. I'm asking you, would it go to zero numerically, and would it go to zero if you added up percentages? Do the percentages add to zero?

A To answer that, you're going to have to tell me, I think, a little bit more about the context in which we're sampling. If, on the surface, you've got equal-sized sampling units, or even if they are unequal-sized sampling units, if I understand the problem, you're taking a random sample of the whole ensemble, or the total number of units that you have, and then you're looking at, okay, how many of those came from the first,

how many came from the second, and so on, through number five, or whatever the last number is.

And then if you look at some are over-represented, some are under-represented, if you add up those over minus,

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or the observed minus what you'd expect, that will sum to zero, regardless of whether --regardless of the size of your tracts or your sampling units, I believe. If I'm understanding your problem. But it isn't quite --well, I'll let you ask your question.

Q Okay. Suppose you had a census tract with one person in it.

A Okay.

Q Okay. Now, that --and that person didn't show up on a jury. You might have an under-representation of a very large amount, whereas if you had a census tract with a thousand people in it and one person didn't make it on the jury, the under-representation would be substantially less in terms of percentage, even though it would be the same number of people, isn't that correct?

A That could be, yes.

MR. LAWRENCE: Okay, I have no further questions, thank you.

JUDGE SULLIVAN: All right, thank you.

Any questions?

MS. YATES: No questions.

JUDGE SULLIVAN: Mr. McMorrow?

MR. MCMORROW: Nothing further, your Honor.

JUDGE SULLIVAN: Judge Leiber?

JUDGE LEIBER: Nothing.

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JUDGE SULLIVAN: Okay, thank you very much, sir. Appreciate you coming back.

THE WITNESS: You're very welcome.

JUDGE SULLIVAN: Have a good day.

Mr. Lawrence, anything else you wish to present?

MR. LAWRENCE: No further witnesses.

JUDGE LEIBER: Ms. Yates?

MS. YATES: No further witnesses. We are prepared to make closing statements if the Court would like.

JUDGE SULLIVAN: Mr. McMorrow, do you wish to present anything?

MR. MCMORROW: No, your Honor. The only thing I would note here--and the problem, of course, is, getting all this data together, is just the fact that it's been kind of difficult, I have not been able to present these updated--the new exhibit and the updated old exhibit to a statistician for analysis. My suspicion, from what I know is that there'd be no reason to do so.

I do wish to reserve the right to do that, and if I feel it's necessary, to petition the Court to reopen proofs to be able to do that. I frankly suspect, from what I have heard, what I have learned, that any statistical- any statistician that I present this information to is not going to come to a conclusion other than Dr. Stoline's, and so I --with the caveat that if, upon further

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investigation, I find something I would like to petition the Court to reopen proofs, whatever the decision is made be, I have no intention of calling any witnesses at this time.

JUDGE SULLIVAN: We do have this specter of the Court of Appeals looking down on us.

MR. MCMORROW: Yes.

JUDGE SULLIVAN: Wanting this decided, not tomorrow, but a couple months ago. so it's--

MR. MCMORROW, And the other possibility is that if I find that there is some need to do something, I would ask the Court of Appeals to remand to supplement the record.

JUDGE SULLIVAN: All right. Do you wish to make some argument, then, Mr. Lawrence?

MR. LAWRENCE: I believe Ms. Yates would like to go first.

JUDGE SULLIVAN, All right.

MS. YATES: Just a brief closing argument on behalf--

JUDGE SULLIVAN: What is the burden here, by the way, what's—who has the burden and what is it today?

MS. YATES: Well, I'll explain the legal test, if I may. It's really set forth most notably in the United States Supreme Court case which is Duren v Missouri, 439 U.S. 357, a 1979 case. In that case, basically three prongs that the defense needs to come forward with, and [Page 46]
then shifts the burden if those are met.

The first part of the test is that we have to show -- we're talking about a distinctive group here, and it's been held in case law, and I don't think the prosecution disputes, that the African-Americans who are at issue in this case are a distinctive group.

The second prong can be summed up by saying we need to show under-representation, and I also don't believe the prosecution is really disputing that. We presented testimony from Kim Foster about his observations about the under-representation of blacks on the juries during this time period. Richard Hillary as well put it in more concrete terms, I think referred to the 98 percent of the time having all white juries and maybe just two or three, if you're lucky, in a panel of 150 to 175 jurors.

And also, I think the Court may be willing to take judicial notice of that, since the Court has been involved in this process.

The third prong is really the focus of the dispute here, and that's that we need to show that the under-representation was systematic. And it's important to keep in mind that that doesn't mean intentional, and there's nothing about a malicious basis here. What it means, in the language of the U.S. Supreme Court case in Duren is that it's inherent in the particular jury

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selection process utilized.

Our argument is that it is in this case, and our main witness supporting that prong is Dr. Stoline, who you just heard from, and who you heard from previously. And he has testified and demonstrated in his report and his analysis of our data that there's been a substantial under-representation of jurors from the minority tracts, and estimated flowing from that a substantial under-representation of blacks. In fact, in the term at issue in Mr. Palmer's case when his jury was selected, it was an estimated 41 percent under-representation of blacks, and Dr. Stoline said that can't be by chance, he said that's powerful evidence the disparity can't be by chance.

At that point, once we establish those three prongs, which I believe we have, the burden shifts to the prosecutor if we've established a prima facie case, the burden shifts to the prosecutor to show a compelling state justification.

I would argue that that can't be shown, especially since we know that efforts were--you know, changes were made, efforts were taken, steps were taken, after the time period at issue here, to correct things, and there seems to have been some improvement And the history of the issue in this, in Kent County Circuit Court, really confirms and bolsters our conclusions on this. The problem has been
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identified since at least the early nineties.

We know from our expert, Kurt Metzgar, that there were all kinds of techniques available, well developed, well understood, and recognized for dealing with what is understood to be a presumed under-representation of minorities when you know government's trying to get people to do something. Mr. Metzgar talked about the considerations that lead to under-representation being more prevalent in Kent County, based on census data in the black community,

such as more transient, more single parent families, more transportation problems, lower income, that sort of thing.

He also testified that you can't get a fair cross-section of the community without affirmative efforts to boost the minority population, and I'm not talking about cutting-edge things, I'm talking about steps that are just essential to try to even it out.

It's important to note that in the 1993-94 period that we're talking about here, the undeliverables were still being discarded; that change hadn't been made yet. There's some testimony about the second questionnaires being sent out, Mr. Foster thought it was just starting at that time here, and Mr. Hillary thought it hadn't started yet. Now, of course, the problem the Court has to deal with is that the causes of this sort of thing are going to be very

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amorphous and very complex.

In the Hubbard case, they never really knew what the causes were, you never really know, and in this case we can't answer a lot of it because the data bas been destroyed or it's just simply unknowable, the race of the people who show up. But one thing we do know that's interesting in this case is that the efforts that have been made by the county, and the judges and the courts have helped, the problem is that they helped after Mr. Palmer was convicted by an all-white jury from an all-white panel.

So I'm really ask the Court for narrow relief. I think this would be a harder, much harder, perhaps impossible claim to make today, but back then the steps hadn't been taken. I'm sure there are few preserved objections from that time period, perhaps only ours. Mr. Palmer was prejudiced by the systematic exclusion, under-representation of minorities, and we think he deserves a new trial. I think it's also interesting that the relief we're requesting may actually be available now

because of the good faith efforts and how conscientious the Court has been in addressing the problem.

JUDGE SULLIVAN: Thank you, Miss Yates.

Mr. Lawrence?

MR. LAWRENCE: Okay, thank you. In terms of the

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burden of proof, I believe that the burden of proof is on us, the defendant appellant. What is it that we must prove? Three things.

First, the excluded group is a distinctive group in the community, and I think we all recognize African-Americans are a distinctive group. That the representation of the group is not fair and reasonable in relation to the number of such persons in the community. I think that the testimony of Dr. Stoline establishes that, and that therefore what's really being litigated here is whether the under-representation is due to systematic exclusion of the group in the jury selection process.

So how do you discover if something is systematic? Well, one way of doing that is look at this, does it keep happening? And when we look over these individual terms, we have 18 terms, six months in one --six terms in one report and 12 terms in the other, or actually 11 terms in the other, so 17 total, and what we find is, is that of those 17 times, it happened 15 times, the under-representation.

So, to me, there is a demonstration of systematic when the same thing keeps happening over and over and over again, whether or not you can find the reasons. Now, can we find some of the reasons? I believe that we can, and this goes into the testimony of Kurt Metzgar.

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Now, Judge Sullivan mentioned, is it possible we're talking about economic bias here, and to a degree, when you're talking about economic bias, you are talking about racial bias, because of the statistics that Kurt

Metzgar elicited. For example, the white people in Kent County, only six percent have no car. The black people, 30 percent had no car. The white people, 19 percent ran single-parent households, the black residents of the county, 64 percent ran single parent households. And you go down the list, 6.7 percent of the whites in poverty, 31.5 percent of the blacks in poverty. Renters, white people, 25 percent renters; black people, 59 percent renters. White people, 20 percent had moved in the preceding 15 months; black people, 32 percent had moved.

Why is this important? For a couple of reasons. Number one, we have the fact that a non-random element is introduced into the mix, and that is, the excuses, the excuses that are given to certain court employees who, without making any record of it, either say yes or no. And certainly if--the excuses that were listed were among things like "can't get transportation," "can't get a babysitter." Well, if you belong to a racial or ethnic group that doesn't have as many cars, that has more single parents, that has more renters, more movement, you're going

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often than those who don't suffer from those economic or related disabilities.

JUDGE SULLIVAN: I don't mean to interrupt you here, but is there testimony to that effect? I remember testimony about the fact that people would come in and ask perhaps to be excused because they didn't have a babysitter or whatever, but was there any testimony about whether they were excused for that reason or not?

MR. LAWRENCE: Well, we had the testimony that that was among the things that people were excused for, but since they kept no records of excuses, no records of the race of the people being excused, no records of the reason, we only have the anecdotal evidence that Kim Foster was able to give us.

JUDGE SULLIVAN: But that's my--was that his testimony, that they were excused for those reasons?

MR. LAWRENCE: Yes.

JUDGE SULLIVAN: Or simply those were the types of requests that came in?

MR. LAWRENCE: I believe so, yes.

JUDGE SULLIVAN: All right.

MR. LAWRENCE: Okay. Continuing, we have also the fact that these lists are made a year in advance. Therefore, as you start to get towards the end of the year, such as September of '93, where Mr. Smith's case lies, what

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you find is that if the people have moved away during that year, or moved to another place within the county, then they ate not going to be found and they are not going to appear in the jury box. So the effect of Having more black people moving from residence to residence is somewhat small in the early months of the year, of the jury year, but as you get further and further towards the end of the year, what you find is that a greater and greater proportion of black citizens are no longer available to get into the jury box, because more of them have moved from their original residences.

So you have the fact that, as Kurt Metzgar indicated, in the black community itself there's a certain amount of resistance towards cooperation with the government, and that a significant number of people, more than in the white community, will simply refuse to send the questionnaires back. Now, the testimony of Kim Foster was that only about five percent of the mailings were undeliverable, according to the post office, but that there was an additional 20 percent where the people simply didn't send anything back. So here you have 25 percent of this total universe is essentially completely excluded from appearing on the jury at all.

Now, Mr. Foster did say that after this period of

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time, they began doing certain follow-ups, et cetera, et cetera, but during this period of time, he said that, yes, they might send an additional letter, but unless the person had a telephone, that they weren't going to be able to get a person in here to accuse them of contempt of court for failing to show up for jury duty.

So you have another non-random element entering, that is, people who have telephones versus people who don't, and although we did not have specific telephone statistics given by Mr. Metzgar, I think it's a reasonable conclusion that in a community where you have a lot more poverty, you're going to have a lot fewer telephones, in that telephones cost a significant amount of money.

Then we have yet another factor, and that has to do with the felony convictions that I introduced data indicating that the rate of felony convictions in the black community in the State of Michigan is eight times the rate of felony convictions for white people, and what that means is that when you have the entire universe of people with felony convictions removed from possibly appearing in the jury box, then what you are going to get is a much whiter jury.

Now, in addition to all of that, we have the fact that, according to Kim Foster, before October 1st of 1993, that this county, Kent County, was doing the same thing

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that Kalamazoo County was doing, that is, that they were bringing in a pool of jurors and first taking care of the district courts.

JUDGE SULLIVAN: I don't think he--did he testify to that? My recollection is he said he wasn't around, he didn't know what they did then.

MR. LAWRENCE: I believe that's at transcript page 30 and 31. And I believe--yes, on page 30 I believe that Mr. Foster indicates that beginning October 1st of '93, that is when they began drawing the Circuit Court jurors first.

JUDGE SULLIVAN: Sorry to interrupt you, but we want to refer to the transcript and we're missing a copy, and we know there's one around here somewhere.

MR. LAWRENCE: I'd like to request that you start looking at page 27 through 31, I believe those are the pages that would cover the subject.

JUDGE LEIBER: Thank you.

(Court recessed at 3:10 p.m.)

(Court reconvened at 3:34 p.m.)

JUDGE SULLIVAN: Well, Mr. Lawrence, I apologize deeply for interrupting your argument. We were back there, in addition to looking over some things, we --I must confess we had a cup of coffee and chatted a little bit.

MR. LAWRENCE: Well, that's quite all right,

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because I always like it when the judge takes the opportunity to look at the record, which is an important thing to do.

I'd just like to just summarize some of the points I've made, which essentially boils down to we've shown the statistical disparity through witness Kurt Metzgar, we've shown a lot of reasons why that disparity takes place, and then finally, through the testimony of Richard Hillary and Kim Foster, we've shown that certain remedial measures were capable of fixing it, and I think that's also of importance, too, because say you have an electrical outage at your house, through part of your house, and you replace this wire and nothing happens, you replace that wire and nothing happens, but finally you replace this fuse and the lights come on. The fact that that worked tends to show you that you've found where the problem lies. And in this case, the problem lies in not taking certain steps to overcome the non-random elements that are introduced into the pie as a result of a variety of reasons that were identified by Kurt Metzgar.

So I think that we also have the fact that in this period of September of '93, it was when they were still

sending the jurors first to District Court, and only then to Circuit Court, just like in Kalamazoo, and numerically, we have a very high under-representation of 34 percent.

So I think that you put those things together, and
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I think that we have established that there was an under-representation, and the statistical figures show it happened again and again and again, thereby showing it was systematic, and Kurt Metzgar showed some of the reasons why the systematic under-representation would happen. And then finally, Richard Hillary and Kim Foster showed how certain remedial measures have helped to clear up quite a bit of that discrepancy.

So I think that merely because the Court might grant relief to Mr. Smith doesn't mean that every single person being tried today would necessarily have a complaint, because apparently the situation has much improved. Our case has an extra element to it that the case of Mr. Palmer does not have, and that has to do with a portion of the argument that concerned the fact that the defense counsel specifically requested additional peremptory challenges. And he asked for those, and the question, I feel, is whether there was good cause for them and I think when you have this kind of level of under-representation, even if it had not been systematic, that this would be good cause to get some additional challenges. If you read the jury voir dire, what you're going to find is that the attorney again and again and again asked people questions designed to reveal possible bias that they might have towards African-Americans. 37 people were asked
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these questions, 37 people, all of them white, and none of them revealed even the slightest hint of any prejudice, and I would simply suggest to you that what that demonstrates is that asking these questions is not necessarily going to reveal prejudice that might be there,

because I think it would be unreasonable to say, given the history of everything that's happened in our country that if you pick 37 random white people, that not one of them would harbor any racial prejudice at all.

And so that kind of situation, where the questioning really isn't adequate to bring out the facts, that is a situation where additional peremptories should have been granted. And so that is also a part of my argument. But I think that in terms of the standard of the Duren case, we've shown the under-representation, we've shown reasons for it, and that there is in fact no need to show that somebody in the clerk's office was maliciously doing this, deliberately trying to keep blacks off the jury. If they were just keeping off the jury people who didn't have cars, it would have the same effect as if they were doing it maliciously. And the question isn't intent, the question is whether it's systematic, whether it kept happening again and again and again, and the testimony of Dr. Stoline was clearly from the statistics, that it did happen again and again.

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Therefore, it was systematic, and for those reasons--well, just one more point.

We have approximately 38 witnesses that were in that bar that night. Every single one of them but one was a black person. So we have this weird situation where we have a defendant who was black, virtually every witness on the witness stand, except for some of the police officers, they are all black. But we have a white judge, white jury, and I think that that's the--that should give somebody some cause to worry that something may not be right here.

And it was a worry that Richard Hillary and the Defender's Office had year in and year out, they noted that you hardly ever saw any black person on a jury, but once the changes were made, they started seeing more black people on juries. And I think it's commendable that Kent County made those changes, and I think all we

have to do now is, there's a couple of people who made the timely objections, and I think they should have a new trial before a fairly selected jury.

JUDGE SULLIVAN: Thank you. Just a question before you sit down. First of all, as I understand it the -- well, there is--you interpret Mr. --Dr. Stoline's testimony to suggest that the problems relative to under-representation during the period you're talking about, when your client was involved here, was worse than
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the other case that's before Judge Leiber. I know there was some testimony about that, he kind of equated the two in some ways.

MR. LAWRENCE: Well, it depends on how you measure up your time segments. If you're just looking at that particular month, in fact, the discrepancy in Mr. Palmer's month was even worse than the discrepancy in our month. Their discrepancy, I believe, was 43, ours was 34. If you're doing it in terms of years, my year was 18 percent, their year was 15 percent. So depending on how you rack up your time, the discrepancy in our case might seem worse, or the discrepancy in their case might seem worse.

But what we have in our case that they don't have in their case is that we have a specific change in policy that took place October 1st of '93,

JUDGE SULLIVAN: That, of course, is what I am getting at.

MR. LAWRENCE: Yeah, so in terms of that month, I mean, you can see that the month following my month, the figures were very much improved. In my month, with this 34 percent, that is a very significant figure, and of course the figures go up and down from month to month for reasons that were never explained by any of the witnesses.

We do have however, Kurt Metzgar's explanation of why it was happening in general.
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JUDGE SULLIVAN: Again, the percentages, too, though, might be markedly different with fewer raw numbers that would make those changes. I mean, for example, that 34 percent or whatever that you referred to, there was testimony today that that was basically because there were four fewer blacks than should have been, if you had an equal representation, if I understood the testimony, and four more would have made a difference, where in another month it might have been totally different from that; you'd agree with that, I guess.

MR. LAWRENCE: Well, yes, I certainly do, and all I can say is that I think it would have made a big difference to Mr. Smith if he had looked up there and seen four black faces, or even one black face, as opposed to seeing nothing but white faces. We know all of the hubbub that went on in the Detroit case of the police officers, Budzyn and Nevers, their first trial, and all the talk about how horrible it was that these individuals were forced to go to trial with a mostly black jury, but at least there--even at their first trial, they did have a couple white people on their jury.

Mr. Smith comes into court and he sees nothing but white faces, even though be knows that this county is not completely white. And I think that while four doesn't--may not seem like a big number, that could be up to one-third

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of a jury, and I think that it would have been very significant to Mr. Smith.

JUDGE SULLIVAN: Thank you very much, Mr. Lawrence.

MR. LAWRENCE: Thank you.

JUDGE SULLIVAN: Mr. McMorrow?

MR. MCMORROW: Your Honor, I think it is critical--your Honor, I should say your Honors. It is critical, I think, to remember what we are talking about. It is not the right of a defendant to a jury comprised in whole or in part of members of the same distinct group to

which that juror belongs. A defendant has no such right, and never has had such a right. The right that a criminal defendant has is a right to a jury comprised of members drawn from a fair cross-section of the community.

I agree with the standards of Duren v Missouri that have been cited by Ms. Yates and Mr. Lawrence to establish a prima facie violation of the fair cross-section requirement. The defendant has to show, first, the group alleged to he excluded is a distinctive group. Secondly, the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of those people in the community. And third, that this under-representation is due to a systematic exclusion of the group in the jury selection process.

Are African-Americans a distinctive group in the
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community? Yes. I would certainly concede that. What has been interesting to me in the testimony of Dr. Stoline is, quire frankly, these numbers which he readily admitted are estimates. They are estimates based upon analysis of statistical data, and not actual counts of jurors, because those counts do not exist and probably cannot be recreated, would indicate for the period of time from October '93 to October '94, 25 fewer black jurors than expected. Expected 164, estimated number of black jurors, 139. That is an under-representation of approximately 15 percent, which again, quite frankly. given the discussion of the problem that had been observed and the testimony of how rare it was to see black jurors, is not nearly as bad as one would have perceived the problem to be, from anecdotal testimony, anecdotal evidence.

With regard to the April '93 to October '93 term, that is broken out into tenths of numbers, so expected black jurors of 67.6, actual black jurors of 55.5, a shortfall of 12.1. That comes out to a shortfall of 18 percent. It's noticeable that the October '93 to October

'94 shortfall is 25, and that that's 15 percent. The shortfall April '93 to October '93 is 12.1, far fewer, but we're talking a smaller time period and a smaller number of jurors who were called for Circuit Court juries, and so the percentage is slightly higher.
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Dr. Stoline's testimony was, I believe, that these two results are quite consistent with each other. And it would seem to me that they are; the difference between 15 percent and 18 percent is not significant, particularly when the 18 percent is over a shorter time period and smaller number of jurors.

So what really struck me with that testimony was the problem was not as bad, in Dr. Stoline's estimation, as the anecdotal evidence would have indicated. Nonetheless, this Court had, and your Honors know the steps that had been taken by this Court, the 17th Circuit Court, to try to address the problems of under-representation of black jurors, and many things have been done to do that.

The question we're asking today is certainly, in part, is this under-representation due to a systematic exclusion.

Now, the defense argument is that if--is that, when they say systematic exclusion, they are not talking about something that was done maliciously or with the intent to cause such an under-representation. And to some extent I can agree with that. If there is an exclusion that happens because of the manner in which jurors are selected, and if jurors are artificially selected, let us say, for example, that by random--like it was decided that, well, we'll take certain census tracts and we'll take most of our
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jurors from here, and by pure accident it turned out that that--that the majority of those census tracts were from predominantly white areas, and all the predominantly

black areas were excluded, even if that were not done maliciously, I would agree that that is systematic.

But I am aware of no authority that says that a systematic exclusion can apply when the systematic, so-called systematic exclusion is from the problems of people not having cars, not having telephones, being single parents, having single--parent households, being in poverty, or any of the sort of economic issues which may unfortunately, and--but nonetheless realistically, have a racial component to them.

Mr. Metzgar's testimony was very interesting, it provided numbers to that which I think most people understand, which is to say, that poverty affects African-Americans far more than it affects white Americans, although it does certainly affect all groups in America. But if in fact people who are renters, people who have moved in prior, I think it was 12 months, 15 months, whatever the period of time was, if people who are single parents, heads of single-parent households, if in fact for those reasons they do not return jury questionnaires or seek exclusion voluntarily from the jury process, I have seen no case that has defined systematic exclusion to go so

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far, and I think it would be a very dangerous thing to start talking about this as being systematic exclusion.

If in fact African-Americans are more suspicious of the criminal justice system in general, which is something that, anecdotally, we would believe would be certainly possible to be true, and if, therefore, for those reasons, they wish not to participate in the jury selection process at a greater level than do white people, many of whom also are distrustful of the criminal justice system and do not wish to participate, but perhaps at not as high a percentage, I think would be very dangerous to say that is systematic excluding.

The testimony in this case from Mr. Foster, I believe, was that what had been done before the recent

changes where there were stronger efforts to try to address the shortfall of potential black jurors was that the questionnaires were not returned, it would be sent out randomly to, randomly to the community, but I believe the testimony now is that if a questionnaire is not returned, it is sent to the same Zip-plus-four area, so that you ensure that the questionnaires that come back are from--are in proportion to where they originally went out, that is actually not in comport with statute, as an effort of this Court to try to address a problem.

I don't recall if Mr. Foster testified to this or not,
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but I believe this Court had permission from the Supreme Court to essentially violate the statute in order to try to redress that problem. I think, however, it is quite a stretch to say that there is systematic exclusion because of all of these other extraneous factors that were not built into the system as it existed for the selection of jurors.

The one argument that has been made, that has certainly facial merit, and I think I have to address here, is the question of the Hubbard problem as it relates to Mr. Smith's case. What is to me interesting is that if the Hubbard problem existed for the period of time in Exhibit H, which covers April '93 to October '93, and if in addition to that period of time the same factors were at work for the October '93 to October '94 data, then one would expect there to be a substantial difference; that is to say, if all these other extraneous factors, such as questions of percentage of people who own cars, percentage of people who live in poverty, percentage of people who are single-family heads of household, assuming these things, and I think it's a reasonable assumption, were roughly the same in the period of April '93, October '93, as they were for October '93 to October '94, then with the latter 15 percent estimated shortfall, we should expect a far, far greater shortfall for April '93 to October '93.

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Instead, what we have is an 18 percent shortfall, one which I would submit is not statistically different from the period of time from October '93 to October '94. I would also want to note in this regard, Mr. Lawrence has referred many times to the 34.8 percent shortfall for the time in which Mr. Smith was tried. What that really talks about is Dr. Stoline's estimated actual number of black jurors, 7.5, expected number of blacks, no bias assumed, 11.5. Now, that comes out to a 34.8 percent shortfall, but you can see how, with small numbers, I mean, if it were 11.5 it would be a zero shortfall. So you can see with each number of jurors, one juror estimated short, comes up to an eight percent additional shortfall.

I think you have to he a little careful about using those numbers that way for that reason, I think what you have to do is use the accumulated numbers, the accumulated numbers for the period of time is 18.0 percent. And that involves times when the shortage was very small, referring to Exhibit H, Table 4, Number 10, .4 percent under; Number 11,9.2 percent under, by random chance those fluctuations would occur. If we're talking about the effect of the system, which is what we have to talk about, then we have to look at the total figure of 18 percent for the April to 24 October '93, and for the October '93 to October '94 we have to talk about 15 percent when we're talking about the

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system.

The issue is not whether or not there were minority members or African-American jurors for a particular venire, it is whether there was systematic exclusion. That's what we have to look at. I would submit that based upon what's been presented, what we have, as much as anything else, is evidence of that which the Court already knew from this period of time. There were problems in getting African-American jurors into the Circuit Court, a problem which Dr. Stoline's estimation

would indicate wasn't quite as bad as everybody assumed it was, but was, nonetheless, there, but that it was the result of factors that had nothing to do with the manner in which jurors were selected, it had to do with economic factors over which the Court has no control, and no one has any control. I would submit that based upon what has been presented, that there has not been a showing of systematic exclusion, and we would respectfully ask that the motions for new trial be denied, Thank you.

JUDGE SULLIVAN: Thanks, Mr. McMorrow.

Rebuttal argument?

MS. YATES: I think it really comes down to, I guess, after hearing the prosecutor's argument, what does systematic mean, and his argument seems to be that it's not systematic because it involves factors that are beyond our

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control, or societal factors or economic factors. And that's an interesting legal question here, is --are affirmative efforts required, and there's not a whole lot of case law on that.

I would like to give the Court one quote from a California, I think it's a California Supreme Court case, but People v Harris, 679

JUDGE LEIBER: If you're going to --please slow down, because I tend to be a visual learner, and I can't read it and listen so well, so speak much slower-and would you give me that citation again, please?

MS. YATES: Yes, People v Harris, 679 Pacific 2nd 433, the Pin cite is 446, and this is a 1984 California case.

And that case has a quote in it on this discrete point, saying that "Officials must adhere to a standard more stringent than mere abstention from intentional discrimination, they have an affirmative duty to develop and pursue procedures aimed at achieving fair cross-section of the community."

I just want to close by saying I disagree that these are factors that are beyond the Court's control, and we have a history here that shows that they are not. Mr. Metzgar made the statement that, you know, in this kind of thing, census taking, any kind of government solicitation, you can't get fair representation without
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adjusting for and, you know, recognizing the natural under-representation without taking steps of that nature. So I think that that's how we know this was systematic.

JUDGE LEIBER: May I ask a few questions of you, Ms. Yates? And it may be because of the hour, and numbers of dates and numbers of numbers flying through the air this afternoon. I'm specifically speaking of the case involving Mr. Palmer, and I just want to make certain that we are on the same page in this regard.

There's no question Mr. Palmer was tried in January of 1994 and the jury was picked prior to the trial, correct?

MS. YATES: Correct.

JUDGE LEIBER: And it was in October of 1993 that certain procedures were implemented, among them, potential jurors were drawn by the Circuit Court first, and then the District Court subsequently would have its opportunity to draw from the list, correct?

MS. YATES: Correct.

JUDGE LEIBER: And it was, I believe, from the testimony of Mr. Foster. that given a high school study, that a Circuit Court, Kent County Circuit Court procedure was implemented to follow up in the Zip-plus-four area of those people for whom questionnaires been sent but none had been received, that also was in place prior to January of '94, is that correct?
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MS. YATES: Sending out the second questionnaires? There was some discrepancy in the

testimony on when that was implemented. I think Mr. Foster believed it began in October of '93, Mr. Hillary thought it didn't begin until after that, but he said he'd be willing to defer to Mr. Foster, but there was some dispute on that.

JUDGE LEIBER: Thank you. That is the point I was trying to make. I think that deferral by Mr. Hillary seems to, at least for purposes of the record, suggest that that procedure is in place. From the testimony here, it would appear there's been no change, effectively, since October of 1993, and that the procedure from which the jurors are called for Circuit Court service is the same now as it was back then.

MS. YATES: I don't think so. I think the changes that I understand are the--the one thing they weren't doing that year that they now do is doing something with the undeliverables, those that actually come back as undeliverable. They were doing nothing with those at the time, the 1993-94 jury year. Now, they send those back to the same neighborhood, as I understand it. I think that was Mr. Foster's testimony, and also, the various outreach efforts that were implemented after the City High School study did not take place until after that point.

JUDGE LEIBER: After what point?

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MS. YATES: I'm not sure what the testimony was, but it's my--I've talked to Mr. Foster in court and out of court so much that I am not sure I'm clear on what he said at what point, but it's my understanding that those efforts took place after my client was tried, and there was a new, a new actual policy that went into place in 1994, that they started to work from.

JUDGE LEIBER All right. Well, Thank you, I mentioned this, and I'm sorry to have taken your time, just simply because I've received the transcript, that I haven't been able to review Mr. Foster's testimony in completeness. But you're suggesting that the change in

the --well, never mind, I've already answered my question.

MS. YATES: Undeliverables was the key. More concrete, there is testimony from Mr. Foster that that wasn't happening in my period.

JUDGE LEIBER: Thank you very much, Ms. Yates. Appreciate it.

MR. LAWRENCE: I'd just like to make a couple very brief comments. First of all, there was testimony on page 81 of the transcript by Dr, Stoline that the under-representations here went beyond what we would simply expect by chance, He also said, at pages 72 and 73 of the transcript, that in those census tracts with the highest proportion of black population, that there were several

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under-represented, not one over-represented.

Now, Mr. McMorrow mentions, well, are the figures from before October of '93 and after October '93 that much different, thereby suggesting that this change concerning diverting jurors to District Court first, as in Kalamazoo, whether really made a big difference? But I think there's another change that happened at the same time that's to be looked into, and that is a change in the court administrator, Because if you're talking about individual decisions that are being made, this person can be excused, this person won't be excused, these follow-up letters will be sent, these follow-up letters will not be sent, there were a number of changes that take place in that October period that might tend to reduce the statistical discrepancy in those two one-year periods.

JUDGE SULLIVAN: We'd have to totally guess at that, wouldn't we?

MR. LAWRENCE: Well, unfortunately, Mr. Foster testified they didn't keep records about these people being excused, they didn't keep records as to their race, what the excuses were, we simply don't have that information, and therefore we can't really base an

argument on it. But what I'm saying is that because many of those decisions were made by personalities, by individuals, the fact that you have a different person in there, might possibly
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explain a statistical result indicating some change.

The other thing that I wanted to mention that I felt was important was the carryover effect, and that has to do with the rule that once a person has served on a jury, that person does not serve again for at least one year, and so you have a carryover effect, If there's some statistical problem that occurs in one year and you then change the rules to get rid of that statistical problem, as long as you have the rule that a juror can't come back during the space of a year, that there's going to be a carryover effect, the old ills, as it were--

JUDGE SULLIVAN: Not to interrupt you, they can come back, just that they can get off if they want to, isn't that the case? I don't believe they are excluded from being a juror, just that they have the option to elect out,

MR. LAWRENCE: Well, if that's the case, I'd certainly defer to your Honor on that, but I would make the point that where such a rule exists, even if it's a voluntary rule, that the evils of an old system will carry over for the period of one year until all of those grandfathered persons, as it were, are eliminated from the system,

I would just say that it's, if it's not systematic, then it's awfully peculiar how, in 15 out of 17 months, we have the greater black tracts being under-represented and we don't have a single case of a black tract being
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over-represented, month after month after month. Whether, whether you say that that's because people don't have cars or they are poor or they are renters or they are moved, it's all part of the system, because the system has means of dealing with this but at the time,

the system wasn't dealing with it, and that's what we're complaining about.

JUDGE LEIBER: How does the failure to have a car enter into this discussion?

MR. LAWRENCE: Because people would be excused by the court administrator because they said "I don't have transportation," and I think that it may not be a one-to-one correspondence, but I think it's reasonable to assume that if you have a population in which a substantially fewer amount of people have cars, then those are the people who are more likely to have a problem with transportation and more likely to get that excuse.

JUDGE LEIBER: Excuse me, but at page 28 of the transcript, which I have seen today for the first time, the failure to have a car seems first to have appeared in a question that you raised, in which you suggested, a non-statutory excuse such as "I can't get a ride." When asked if things of that nature occurred, along with "I can't afford to take off work," and "I can't get a babysitter," the answer was "yes." The reason I say that is because although public transportation is not ideal,

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public transportation does exist, with the Hall of Justice being a terminus for the buses, or at least having been a terminus for the bus system for a number of years, I think perhaps during the period suggested. So that not owning a car does not mean unqualified for jury service.

MR. LAWRENCE: No, but we're talking about statistics here, and if what you said were taken to its logical conclusion, no person would ever be excused for failure to get a ride. Of those people who are going to be excused for not being able to get transportation, I think that it's quite reasonable and logical that those without cars are more likely to be in that group than those with cars.

Similarly, we have the single-parent household situation, where it's far more likely that the single

parent will not be able to find suitable child care than the person raising children in a two-family home. These are things that doctor --Mr. Metzgar testified to exist, but of course, we can't quantify them because of the failure of the court administrator's office to keep the kind of records that we would have preferred.

JUDGE SULLIVAN: What constitutes a distinctive group under Duren?

MR. LAWRENCE: Well, I think that—I don't know that that question really needs to be answered, in that I think that it's clear that African-Americans would fall into that

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group. Based on Duren v Missouri, they were identified as a distinctive group in that case, and therefore, I don't know that we need to carry the analysis further than that, but I think that, you know, it's an interesting question as to whether we would also assign that to ethnic groups that do not have the same kind of history of racial discrimination as African-Americans, It's an interesting question, I think it's a question for another day.

JUDGE LEIBER: Well, excuse me, my colleague has asked the question, I think it really does need to be answered, if you can.

MR. LAWRENCE: Very good, then. I guess that I would say that a distinctive group of the population would be a group, first of all, where you can tell whether the person belongs to that group or not, and secondly, whether there has been a history of discrimination against that group. That's how I would define it.

JUDGE SULLIVAN: Would a medical doctor, for example, if you're talking--talking about discrimination generally as opposed to within the court system?

MR. LAWRENCE, Well, I think that that certainly is another question. I think that--I don't know that there's less discrimination in the court system than

in the society at large, in that the Court system is composed of people who come from the society at large.
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JUDGE SULLIVAN: I don't want to get too far off the point. I appreciate where you're coming from, and your arguments are very well stated and interesting, and maybe persuasive, I don't know. To weigh all this, what I am getting at is we keep talking about the fact that, from the statistical evidence, I guess from Dr. Metzgar, or whatever, that you have more blacks who are single parents, more blacks who don't have transportation, more blacks who move, and so forth, and that explains why blacks are somewhat discriminated against or are not discriminated against, but under-represented on the jury panels, and I understand all those arguments.

The question gets down to, Dr. Sam Shepherd is on trial in Kent County, Michigan. Let's say medical doctor, high income, white, well educated. I don't know whether statistics would support similar arguments. I suspect, and I think a lot of what we're doing here is kind of trying to be practical in thinking about what actually is done. I suspect--I've seen very few medical doctors, as an example, on jury panels. If you could establish that, would be in some way or another perhaps fit into a distinctive group or not?

MR. LAWRENCE: Well, I think another possible analysis that you could use is the suspect classification analysis that's used under equal protection cases, that definitely
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would include African-Americans. There's a question as to women, because sex—gender-based discrimination has been given sort of a middle status. I don't believe that doctors would fall under a suspect classification under that kind of analysis, so perhaps they might not he a distinctive group. Considering that the purpose of this rule in general is to provide equal protection of the laws, perhaps what we should do is simply borrow the suspect

classification, jurisprudence that already exists regarding equal protection claims generally.

JUDGE SULLIVAN: Is there any testimony--and I'll let you go here in a minute, apologize for bolding you. It's an interesting case, obviously. Any testimony, when they changed the Kalamazoo system, what types of changes they saw in there? I don't recall whether it was testified to or not by the witness.

I share some of the same concerns that Mr. McMorrow mentioned, that is, I was quite surprised -- and you've tried to address them in your argument, I can understand the argument very clearly, that by siphoning off jurors to the various district courts, when the argument is that an urban court like 61st District Court has more need for jurors, perhaps, and because the minority populations are more likely to be found within the urban area, that when you get in the county system, there are fewer minorities

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left, I can certainly understand that argument.

Following along with that, I was quite surprised, using the statistics that had been testified here to by your expert witness, to see rather modest, rather modest change, and I know you've attempted to potentially explain that away and there are no clearances here, but potentially explain it away by other circumstances that might have been in play, a new court administrator who might have a different policy or might let more people off than the prior administrator, so forth. But were you not surprised by that result?

MR. LAWRENCE: Well, I'm not that surprised, because a number of the factors that led to under-representation continued to exist before and after the change with respect to sending people to district courts first. In other words, they still continued to excuse people who didn't have transportation, couldn't get a babysitter. You would continue to have the situation of people of lower income who weren't on salaries, but

rather, being paid hourly, not wanting to take off. We would still have the problem of the fact that people would be excluded because of having a felony record. Those things would continue to exist.

So I'm not surprised that, well, in one sense, the difference is three percent. That's one way of looking at it. But three percent out of 18 percent, another way of
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looking at that, is that that itself is a one-sixth or 16 percent change. In other words, it's three percent in absolute, but 16 percent relative to the percentages that we're actually talking about. So it's--I mean, if you move from one percent to two percent, you could look at that as a one percent change or a one hundred percent change, because it's doubled. So you can look at this as a three percent or 16 percent variation.

I think that in either case it is significant, because one of the arguments that I made in the brief is that the whole dynamics of discussion among the group of people will indeed change when there is a person of another racial group on the jury. That if you have an all-white jury, what you are likely to see, perhaps, is, you know, statistically, you would see more remarks of a racial nature, and fewer opportunities to correct those remarks. If there is even one black person in that jury room, somebody is going to be a little more reluctant to come forward with a racial comment, and if they do, it's more likely to he answered.

And these are intangibles, and he's not entitled to any particular number of black people on his jury. All that I know is that we have 37 people got in the box, every single one of them was white, in a county where, according to Dr. Stoline, that simply could not happen by chance.
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JUDGE SULLIVAN: Well, Mr. Lawrence, thank you very much.

MR. LAWRENCE: Thank you.

JUDGE SULLIVAN: Are we under--on issuing opinions on this, I keep going back to the Court of Appeals looking down upon us, and requiring that certain things be done by certain times, and understanding and realizing we're significantly past some of these times already, and I assume with your correspondence and so forth you've at least --you have at least gotten the, if not the blessing of that Court, the reluctant agreement to go along with a bit of a delay, but are we under some time constraint right now to get this thing back to them? Either--any one of you know that?

MR. LAWRENCE: Well, I think that I'd like to answer that. We did send them information about the delay, and they did not come back with any condemnation or any order addressed at that delay, so I have to assume that there is no specific time limit. However, I think that probably it would be a good idea to see if it could be wrapped up in a reasonable time.

JUDGE SULLIVAN: Do you have anything else?

JUDGE LEIBER: I have none. Thank you very much, Ms. Yates, Mr. Lawrence, Mr. McMorrow.

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MR. LAWRENCE: Thank you.

MR. McMORROW: Thank you, your Honor.

MS. YATES: Thank you.

(Proceedings concluded at 4:20 p.m.)

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CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Sharon M. Sweet, Court Reporter in and for the Circuit Court for the County of Kent, State of Michigan, do hereby certify that I reported stenographically the proceedings held in the above-entitled cause before the Honorable Paul J. Sullivan, on April 27, 1998; and do further certify that the foregoing transcript is a true and

correct transcript of my stenographic notes of said proceedings so reported and transcribed by me.
Sharon M. Sweet, RMR., CRR, CSR-2318
Official Court Reporter
DATED: 5-11-98
Grand Rapids, Michigan

Analysis of the Kent County Circuit Court
Jury Selection Process
For the Period: April 1993 — October 1993
by
Dr. Michael R. Stoline
Department of Mathematics and Statistics
Western Michigan University
April 23, 1998
prepared for
Linda Borus — Chief Investigator
Michigan State Appellate Defender Office

Section 1: Executive Summary

This report contains an analysis of the characteristics of the 929 people selected to serve as Kent County, Michigan Circuit Court jurors during the period: April, 1993 – October, 1993. This list of 929 jurors was compiled from returned questionnaires sent to randomly selected names from the lists provided by the Office of the Michigan Secretary of State. The list of 929 jurors is a pooled list from six district samplings for each of six consecutive four-week periods (labeled terms) in this period.

Statistical analyses were performed comparing composition characteristics of this sample of 929 to those adults with ages in the range: 18-49 in the 112 census tracts summarized in the 1990 U.S. Census of Kent County, Michigan. The 1990 population of people with ages in the range: 18-69 in Kent County was 322,383, which was comprised of 89.86% White residents and 7.28% Black residents.

Two conclusions can be drawn from the statistical analysis described in this report:

(1) a larger than expected proportion of the 112 census tracts in Kent County are biased with either an over-

representation or an under-representation of jurors on this list of 929 jurors, and

(2) the biased census tracts containing relatively few Black residents tend to be over-represented on that jury list, and the biased census tracts containing relatively more Black residents tend to be under-represented in the list of 929 jurors.

This analysis supports the overall conclusion that use of this list of 929 jurors could lead to an under-representation of Black residents serving on Kent County Circuit Court juries in this period.

Three summary estimates of the magnitude or the under-representation of Black residents on the jury lists are:

(1) Blacks may be under-represented by about 18% on this jury list of 929,

(2) Blacks may be under-represented in five of the six terms in this period, and

(3) the under-representation of Blacks is estimated to exceed 40% for one of the terms and to exceed 30% for one of the terms.

Specifically, if unbiased random sampling of adults aged: 18 – 69 in Kent County had been employed using the 1990 U.S. Census of Kent County as a frame, one would expect 67.6 = 929* (.0728) Blacks on the jury list. However, only 55.5 Black jurors are expected to have been actually selected to this list using the existing jury selection process.

This is an estimated under-representation of 12.1 Black residents (or 17.9%) from the 67.6 Black residents

expected to be on the list if there were no bias in the selection process used.

This estimated under-representation of Black residents is due to the fact that relatively fewer residents were observed to have been selected from those Kent County census tracts containing more Black residents.

Details describing the background of this analysis are provided in Section 2. Statistical analysis details are given in Section 3. An analysis summary of the estimated over-representation or under- representation bias on a census tract by census tract basis is given in Table 1 or Section 3, and summarized in Section 4. The issue of bias in Black under-representation on the jury list is discussed in Section 5. The estimates of the under-representation of Blacks on a term by term basis are provided in Section 6. Finally, Section 7 contains a brief technical description of the statistical methods used in obtaining the estimates and p-values reported in this document.

Section 2: Introduction

During the fall of 1997, Linda Boris of the Michigan Appellate Defender Office talked with me by phone and asked if I would be able to examine the Kent County Circuit Court jury selection process for the 1993-1994 period Her concern was that few, if any, Black jurors were observed to have been selected or to have served in this period. She asked if I would be able to examine the jury selection process and to specifically ascertain if there existed possible statistical problems with the jury selection process in Kent County in this period with respect to selection of Black jurors.

I expressed interest in examining this process. Ms. Borus then reported that this examination would be needed by early February, 1998.

On December 9, 1997, Linda Borus sent to me a hard disk containing data regarding the composition of the Kent County Circuit Court jury lists for the period: October, 1993 – October, 1994, The data contained the census tract, term selected, and address of 2252 jurors randomly selected by use of lists provided by the Michigan Secretary of State's Office. Eleven separate lists of approximately 200 were provided, each by random selection, one for each of the eleven four-week terms in this period. The Secretary of State list is basically comprised of Michigan residents either possessing a valid Michigan Driver's License or a Michigan ID, and who also resided in Kent County during this period.

The State Appellate Defender Office also provided a data summary of the 19 Kent County U.S. Census to me. This summary contained Black population, White population, and total population census counts of adults whose ages are in the range: 18 - 69 for each of the 112 census tracts in Kent County, Michigan. This 1990 U.S. Census data is attached to this report as Appendix A.

An analysis of this data was included in my report titled: "An Analysis of the Kent County Circuit Jury Selection Process for the Period: October, 1993 – October, 1994." This report was included as part of my expert testimony given in Grand Rapids at a Kent County Circuit Court Hearing on February 2, 1998. An updated version of this report was prepared on February 16, 1998, which included technical details of the procedures used in the statistical analyses.

I was then asked if I could prepare a similar statistical examination for the Kent County Circuit Court jury list selected in the April, 1993 – October, 1993 period. I replied that this could probably be done.

In late March, 1998, Linda Borus sent to me a hard disk containing data regarding the composition of the Kent County Circuit Court jury lists for the period: April, 1993 – October, 1993. The data contained the census tract, term selected, and address of each of 929 jurors randomly selected by use of lists provided by the Michigan Secretary of State's Office. Six separate lists of approximately 200 were provided, each by random selection, one for each of the six four-week terms in this period. The Secretary of State list is basically comprised of Michigan residents either possessing a valid Michigan Driver's License or a Michigan ID, and who also resided in Kent County during this period.

Section 3. Analysis of the April, 1993 – October, 1993 Kent County Circuit Court Jury Lists

Table 1 contains results of a statistical examination of the April, 1993-October, 1993 Kent County Circuit Court Jury lists by census tract. Eleven variables are listed in Table 1. These are N, TRACT, BLPROP, WHPROP, POP, JURY, EXP, DIFF, P, RESULT, and REPRESENTATION. The TRACT variable contains the census tract number for each of the 112 Kent County census tracts. The N variable labels each census tract using a number between 1 and 112.

The variable POP lists the 1990 U.S. Census population of adults for each census tract. The total 1990 Kent County population of adults (ages: 18-69) was 322,383. The BLPROP and WHPROP variables contain the 1990 U.S. Census proportions of adults (ages: 18-69) was 289,704, which comprises 89.8% of the total adult population in 1990. The total 1990 Kent County population of Black adults (ages: 18-69) was 23,476, which comprises 7.28% of the total adult population in 1990. (The numbers of adult Black and White people in each census tract are given in Appendix A.)

For reader convenience the census tract data and analyses are presented in Table 1 by proportion of adult black population from smallest (N=1) to largest (N=112), based on the 1990 U.S. Census data. For this purpose Table 1 is subdivided into three segments. Segment 1 contains the 34 census tracts with the lowest proportions of Black adult residents ranging from 0.0000 to 0.0050. Segment 1 census tracts are labeled with the variable N between 1-34 in table 1. Segment 2 is comprised of the 43 census tracks with the middle proportions of Black adult residents ranging from 0.005 to 0.05. The 43 middle census tracts are labeled with the variable N ranging between 35 and 77 in Segment 2 of Table 1. Finally, Segment 3 is composed of the 35 census tracts with the largest proportions of Black adult residents ranging from 0.05 to 0.909. The 35 largest census tracts are identified with N values between 78 and 112 in Segment 3 of Table 1.

The variable JURY in Table 1 is the total number of observed jurors selected by census tract by use of the lists provided by the Michigan Secretary of State Office. This number is obtained by adding together the six numbers of jurors selected in each of the six individual terms from each census tract.

The variable EXP in Table 1 is the total number of jurors that are expected to be selected from each census tract assuming the selection process is random and unbiased. Unbiased means that the composition of Kent County residents on the Michigan Secretary of State's list is in the same proportions as the 1990 U.S. Census data for Kent County with respect to census tract and ethnicity distributions. Unbiased also means that the ethnicity composition of returned questionnaires is in the same ethnicity proportions as the 1990 U.S. Census data by individual census track.

The variable EXP is calculated assuming the selection process is random and the individual probabilities of selection are proportional to the 1990 U.S. Census data. As an example, the expected number of selected jurors in Census Tract 5 is calculated as: EXP = 929*(2729)/322383=7.86 as reported in Table 1.

The variable DIFF=JURY-EXP is the difference between the observed number and expected number jurors for each census tract. For example, for census tract 5, the difference between the observed and expected jurors selected is: DIFF = 13-7.86 =5.14. The interpretation of this is that there were nearly 5 more actual jurors selected from Census Tract 5 than what one would have anticipated if the juror selection process was unbiased.

Statistical p-values are reported as Variable P in Table 1 to help interpret whether the observed juror selection results are biased or not on a census-track by census-track basis. Small p-values indicate statistical significances and that there is a statistical difference between the observed and expected juror numbers that can not be explained by chance only. Large p-values indicate there is no difference between observed and expected juror numbers by census tract. (The p-values were calculated using SAS and assuming a binomial model.)

The p-values are categorized in the variable RESULT as either being non-significant with a p-value . .25(ns); significant with a p-value between .10 and .25 (s25%); significant with a p-value between .05 and .10 (s10%), and significant with a p-value ,.05 (s5%). The (ns) RESULT is indicative that the jury selection process could be unbiased and fair. The (s25%), (s10%), and (s5%) RESULT values are indicative of possible bias in the jury selection process with either too few or too many

jurors being selected from the individual census tracts. The (s5%) result is stronger evidence of bias than is the (s10%) result, and the (s10%) result is stronger evidence of bias than is the (s25%) result.

Finally, the variable REPRESENTATION is used to indicate whether the census tracts found to be statistically significant (biased) in Table 1 have either too many or too few jurors. Those biased census tracts found to have too many jurors are over-represented in the selection jury list and are labeled: OVER in Table 1. Those biased census tracts with too few jurors are under-represented in the selected jury list and are labeled: UNDER in Table 1.

* * *

[Tables Excluded from Appendix]

Section 4: Examination of Possible Bias in Jury Selection by Census Tract

Table 2 below contains a summary of the results of the statistical testing providing in Table 1 tabulated by non-significance (at 25%) (unbiased) and significance (biased) at three levels: 25%, 10%, and 5%.

Table 2: Evidence of Bias and Unbiasedness in the Jury Selection Process by Census Tract for the period: April, 1993 – October, 1993

Result		Observed		Expected	
		Frequency	%	Frequency	%
Non-significant	(unbiased)	71	63.4%	84.0	75.0 %
Significant	(biased)				
	At 25%	41	36.6%	28.0	25.0 %
	At 10%	23	20.5%	11.2	10.0 %
	AT 5%	11	9.8%	5.6	5.0%

25% level of significance results for unbiased representation

From Table 2 it can be seen that there are 71 (63.4%) of the 112 census tracts determined to be statistically non-significant. There is no evidence of bias in the numbers of jurors selected from these 71 census tracts.

25% level of significance results for biased representation

From Table 2 it can also be seen 41 (36.6%) census tracts had significant evidence of bias (observed at least at a 25% level of significance) in the number of jurors selected. Under unbiased random sampling one would expect 112*(.25)=28 census tracts to be biased at a 25% level of significance. The observed number of 41 biased-census tracts exceeds 28. This provides evidence of bias in this jury selection process.

10% level of significance results for biased representation

For the 10% level of significance results in Table 2, there are 23 (20.5%) of the census tracts showing bias at a 10% level of significance. Again, under unbiased sampling, one would only expect 112*(.10) – 11.2 census tracts to be biased by chance alone. The observed number of 23 biased census tracts exceeds 11.2.

5% level of significance results for biased representation

Furthermore, from Table 2 it can be seen that 11 (9.8%) of the census tracts show statistical evidence of bias at a 5% level of significance. Under unbiased random sampling, one would expect only 112* (.05)=5.6 census tracts to be biased at a 5% level of significance. The observed number of 11 biased census tracts exceed 5.6, which provides further evidence of bias in the jury selection process.

Conclusion about biased representation

From an examination of Table 2 it is concluded that there is significant evidence that biased numbers of jurors (either too few or too many) are being selected from many of the 112 census tracts when compared to the 1990 Kent County Census Tract data.

Section 5: Examination of Possible Bias in Selection of Jurors Related to the Proportion of Black Adults in the Census Tracts

The discussion in Section 4 indicated evidence of bias in the selection of jurors in 41 of the 112 census tracts at a 35% level of significance. We now examine more closely these 41 census tracts, and explore whether there is evidence that too few jurors may have been selected from those census tracts containing relatively more adult Black citizens or that too many jurors may have been selected from census tracts containing relatively more adult White residents.

The variable REPRESENTATION in Table 1 is conveniently used for this purpose. Table 3 contains a summary of occurrences of OVER (over-representation) and UNDER (under-representation) results associated with the 41 biased census tracts identified in Table 1. It can be seen from Table 3 that 20 of the 41 biased census tracts are biased because of over-representation and that the remaining 21 are biased because of under-representation.

Table 3 also provides a summary breakdown for each of three subgroups of census tracts determined by the proportion of adult Black people residing in the census tract according to the 1990 U.S. Census. These subgroups are: Low (census tracts with less than 0.5% adult Black residents), Middle (census tracts comprised of 0.5%-5.0% adult Black residents), and High (census tracts with more than 5% adult Black residence.

Table 3: Evidence of Bias Associated with the Proportion of Adult Black Residence Per Census Tract for the period: April, 1993 – October, 1993

		REPRESENTATION		
		Biased		Unbiased
Adult Black Proportion in Census Tract	Number of Census Tracts	OVER (Over-represented)	UNDER (Under-representation)	NS (fairly-represented)
<0.005 (low)	34	12	3	19
0.005-0.05 (Middle)	43	7	9	27
0.05-0.906 (High)	35	1	9	25
Total	112	20	21	71

Representation of Census Tracts with Low Black Adult Proportions

Table 3 shows that 15 of the 34 census tracts with a low (<.5%) adult Black population proportion show evidence of bias, and that 12 of these are over-represented and 3 are under-represented on the jury list. This provides evidence that the 33% of census tracts with the smallest proportions of adult Black residents show more evidence show more evidence of over-representation than under-representation on the jury list.

Representation of Census Tracts with Middle Black Adult Proportions

Table 3 shows that 16 of the 43 census tracts with a medium (0.5% - 5.0%) level of adult Black population proportion show evidence of bias and that 7 of these are over-represented and 9 are under-represented on the jury list.

Representation of Census Tracts with High Black Adult Proportions

Table 3 reveals that 10 of the 35 census tracts with a high (>5.0%) Black adult population proportion show evidence of bias, and that 9 of these are under-represented and 1 is over-represented on the jury list. This provides evidence that the 33% of census tracts with the largest proportions of Black adult residents show much more evidence of under-representation than over-representation on the jury list.

Overall Conclusion regarding Representation of Blacks on the Jury List

The overall conclusion is that use of this list of 929 jurors could lead to an under-representation of adult Black residents serving on Kent County Circuit Court juries in this period.

The rationale for this conclusion is that there is a strong tendency for the biased census tracts wit the largest proportions of adult Black residents to be under-represented on the jury list. Likewise, there is a tendency for those biased census tracts with the smallest proportions of adult Black residents to be over-represented on the jury lists.

Section 6: Estimation of the Number of Blacks on the Jury List

If true random sampling occurred according to the ethnicity proportions contained in the 1990 U.S. Census for Kent County, one would expect:

834.8=929*(.8986) Whites, and
67.6=929*(.0728) Blacks

To be selected and on the jury list of 929. These are the numbers one would expect assuming the ethnicity composition of the returned questionnaires is identical to ethnicity composition of the 1990 U.S. Census for Kent County adults.

Given the observed biased results described in Sections 4 and 5, one would actually expect fewer Black on the jury list than those estimated above. This expected under-representation of Black residents is because of the anticipated under-representation of jurors from the census tracts with the largest proportions of Black adult residents.

Table 4 contains an estimate or the expected numbers of Black citizens to have been selected in each or the six jury term list selections. Table 4 also contains a tabulation of the combined total of these six terms. These estimates are calculated based on the observed frequencies of jurors selected from each of the 112 census tracts as contained on the summary of the jury list provided in Table 1. These estimates are also made assuming the ethnicity composition of the questionnaires returned (after being selected from the Michigan Secretary of State's list) is identical to the ethnicity pattern in the 1990 U.S. Census for each of the 112 individual Kent County census tracts for adults.

Table 4: Expected Number of Black Jurors by Term for the period: April, 1993 – October, 1993				
	Expected Number of Blacks (no Bias assumed)	Estimated Actual Expected Number of Blacks (bias assumed)	Estimated Difference = (no bias) – (bias)	Estimated Percentage of Over or Under-representation Of Blacks
7	10.6	7.7	-2.9	27.4% under
8	11.4	12.3	0.9	7.9% over
9	10.9	6.3	-4.6	42.2% under
10	11.2	10.7	-0.5	4.4% under
11	12.0	10.9	-1.1	9.2% under
12	11.5	7.5	-4.0	34.8% under
Combined Total	67.6	55.4	-12.2	18.0% under

Expected Composition of Blacks on the Individual Term Jury lists

From Table 4, it can be seen there is an expected under-representation of Blacks on five of the six term jury lists. Only for Term 8 is there an expected over-representation or Black jurors. For Term 9 the expected under-representation of Blacks exceeds 40%. For Term 12 the expected under-representation exceeds 30%. These two

terms present the most severe examples of expected under-representation of Backs on the jury lists.

Expected Composition of Blacks out the combined Jury Lists

From Table 4, it can be seen that 55.4 blacks are estimated to have been selected to the jury list, which is based on the anticipated bias resulting from use of the actual jury selection method. This is an under-representation of nearly 12 Blacks (or 18.0%) from the 67.6 Blacks expected to be on the list if there were no bias in the selection process used.

Section 7: Technical Statistical Analysis Details

Calculation of probabilities reported in Table 1

A binomial sampling model (sampling without replacement) was assumed in calculating the probabilities reported in Table 1. A standard normal model was then used to approximate the binomial probabilities reported in Table 1.

A hypergeometric model (sampling without replacement) would have been used if the actual numbers of adult citizens living in each of the census tracts had been known in the 1993 period, when the jury list lists were selected. Exact 1993 Kent County adult population totals would be needed by census tract in order to properly use the hypergeometric model. Using the 1990 adult Kent County U.S. Census Tract data for this purpose did not seem appropriate. Hence, the binomial model seemed more appropriate since exact population totals are not needed for the binomial model.

Calculation of the Expected Number of Black Jurors

As was stated in Section 6, the expected numbers of adult Black citizens to have been selected to the April, 1993 – October, 1993 juror lists are calculated assuming the ethnicity composition of the returned questionnaires

is identical to the adult ethnicity composition reported in the 1990 U.S. Census for Kent County.

This calculation is illustrated for Census Tract 11.01 (N=100) in Table 1. The adult Black proportion of citizens residing in this census tract in 1990 was BLPROP = 0.27093. Also, as reported in Table 1, the total number of jurors selected to the jury list in the April, 1993 – October, 1993 period was 7. The number of adult Black jurors expected to be on this list from Census Tract 11.01 is

1.8965=(0.27093)*(7).

Similar calculations can be made for the 111 other census tracts. (None of these estimated values are reported in this document.)

Adding togeth4r these 112 separate census tract estimates yields the estimated number of 55.4 adult Black jurors expected to be on the April-October, 1993 jury list, as reported in Table 4.

Calculation of Expected Numbers of Black Jurors by Term

These expected value calculations were also made for each of the 6 terms for each census tract. Table 5 illustrates these expected value calculations for Census Tract 11.01 (N=100) as an illustration.

Table 5: Illustration of the Calculation of the Expected Number of Adult Black Jurors to the 1993 April– October Jury List from Census Tract 11.01		
Term	Number of Jurors Selected in each Term	Expected Number of Adult Black Jurors
7	1	0.27093=1(0.27093)
8	1	0.27093=1(0.27093)
9	2	0.54185=2(0.27093)
10	2	0.54185=2(0.27093)
11	1	0.27093=1(0.27093)
12	0	0.00000=0(0.27093)
Total	7	1.8965=7(0.27093)

As an example, in Term 7 there was 1 juror selected t the jury list from Census Tract 11.01. It is then estimated that there should have been 0.27093=1(0.27093) adult Black jurors selected in the Term 1 selection. Similar calculations are reported in Table 5 for the other 5 terms.

Adding together these 112 separate estimates yields the estimated numbers of adult Black jurors expected to be on the 1993 April-October jury list for each of the six separate terms, which are reported in Table 4.

Appendix A 1990 U.S. Census Data

Attached as 1990 U.S. Census data for adults (ages: 18-69) in Kent County, Michigan by census tract. Included are White population totals and Black (BK) population totals for each of the 112 census tracts.

* * *

[Tables excluded from Appendix]

NATIONAL CENTER FOR STATE COURTS
Washington Office
1110 North Glebe Road, Suite 1090
Arlington, Virginia 22201
Review of Jury System Procedures
Kalamazoo County, Michigan
A Technical Assistant Report
June 1992
By G. Thomas Munsterman

This report was developed under a grant from the State Justice Institute. The points of view expressed are those of the author and do not necessarily represent the official position or policies of the State Justice Institute.

REVIEW OF JURY SYSTEM PROCEDURES KALAMAZOO COUNTY, MICHIGAN

Introduction

At the request of Ms. Devona Jones, Deputy Court Administrator, Mr. G. Thomas Munsterman of the National Center for State Courts, visited the 9th Judicial Circuit Court of Michigan, Kalamazoo County. The purpose of the visit was to discuss the jury management procedures to assist the Special Citizens Panel in its review of the jury systems serving Kalamazoo County. The Panel is specifically concerned with the lack of minority representation of prospective jurors from which the Circuit Court trial jurors are selected. Mr. Munsterman had also been contacted by Mr. Richard Stroba a member of the Panel.

This assistance was funded under a grant to the National Center from the State Justice Institute. The purpose of the grant is to support those states and courts interested in improving their jury systems through the application of the American Bar Association Standards Related to Juror Use and Management. Michigan had sent a team to a

workshop, also supported by SJI, to examine the Standards in light of Michigan's practices. In this report, each of the areas examined are referenced to the appropriate ABA Standard.

Approach

The approach used was to examine the various reasons usually found by the National Center for the lack of minority representation on jury panels. Data from the court or procedures used by the court were examined for each of those areas. The reasons examined were:

1. Is the Source List Representative of the Population? (Standard 2b)
2. Is the non-response to the questionnaires and summons a reasons for lack of minority representation? (Standard 12c)
3. Is the excuse process such that minorities are being excused in greater proportion than non-minorities? (Standard 6)
4. Is the time interval from the obtaining of the prospective juror name until summoning of such a length that many persons move and cannot be found? (Standard 11)
5. Is the allocation of prospective jurors to the various courts causing an imbalance such that fewer minorities are assigned to the Circuit Court? (Standard 3)

1. Is the Source List Representation of the Population?

Michigan is one of only a few states which use the drivers and identification card list as the source of jurors names. About half of the states use the merged votes and drivers list and 5 states use only the votes list. The purpose of the statutory change to the use of the drivers list was to enlarge the coverage of the juror qualified population and include more minorities.

The 1990 population for Kalamazoo County was 223,411. If those under 18 are not considered, the count is 168,900 and if those over 65 are removed, the count is 145,217. The county contains 8.9% black minorities, the city of Kalamazoo 18.75% black minorities. The county's population which is not in the city of Kalamazoo contains 3.4% black minorities. These percentages are based on the total population and not just those persons 18 years old and over.

The size of the drivers list is not known and should be determined, however, the list has many out of date addresses as the following sections will detail. The size of the available list should be obtained from the Secretary of State and compared to the population values.

Based on the estimation of the black minorities serving in the 9th District Court, Division 1, the source list contains many minorities. A survey in that court could determine the exact level.

2. Is the non-response to the questionnaires and summons a reason for lack of minority representation?

The two step procedure of first qualifying a person and then selecting and summoning the person provides two opportunities for citizens to withdraw or be excused from serving. These opportunities will be explained as the two step process used is examined. The first step is to send a qualification questionnaire to each person whose name is selected. In an effort intended to improve the minority representation and to ensure the integrity of the jury system, the court sends a second questionnaire to each person whose name is selected. In an effort intended to improve the minority representation and to ensure the integrity of the jury system, the court sends a second questionnaire to those names not responding to the first questionnaire.

The results of the qualification process including the additional follow-up stems for persons selected for the four courts serving Kalamazoo County are as follows:

	9th Circuit Countywide	9th District Division 1 City	8th District County, Non-City	9th District Division 2 Portage
Accepted as Qualified	64%	51%	63%	66%
Excused	24%	24%	27%	25%
Undeliverable	8%	15%	6%	5%
No Reply	4%	10%	4%	4%
Total	100%	100%	100%	100%

The primary concern of the court, the Citizen Panel and this study, is the lack of racial minorities in the panels of prospective jurors in the Circuit Court. However, data from the other 3 courts provides an interesting diagnostic method. With the same jury board and staff qualifying persons for all courts the data should be comparable such that differences will be indicative of the populations. The qualification figures for the Circuit Court should lie somewhere between the 9th District Court, Division 1 and the 8th District. This is because persons serving in the Circuit Court should be 40% from the city of Kalamazoo, which provides all the 9th District Court, Division 1 persons and 60% of the people from the non-city/county which provides all of the people for the 8th District Court. However, the percent qualified in the Circuit Court is even greater than for the 8th District and the undeliverable and no reply are similar to the 8th District figures as well. As will be discussed later, this indicates that the Circuit Court is not getting many persons from the city of Kalamazoo.

The follow-up effort on the non-responders to the qualification process was very effective as the following figures indicate.

Changes Due to Follow-Up of Qualification Questionnaires

	Circuit	9th District Division 1	8th District	9th District Division
Accepted	+7%	+8%	+6%	+4%
Excused	+2%	+3%	+3%	+3%
Undeliverable	+2%	+3%	+1%	+1%
No Reply	-11%	-14%	-10%	-8%

In each case, the no-reply decreased as expected. Some of the no replies became undeliverables, but many people were found and of those found, most were accepted and qualified. The decrease in the no-reply category by 8% to 14% shows the usefulness of the follow-up process.

The resultant no-reply level in the Circuit Court of 4% is extremely low when compared to other jurisdictions in the United States. In fact, the non-response/no-reply has been reduced so low that even if all those names were of racial minorities, it would not account for the lack of racial minorities on the panels of prospective jurors in the Circuit Court.

3. Is the excuse process such that minorities are being excused in greater proportion than non-minorities?

An analysis of the categories of excuses accepted for each court's prospective jurors could not be done since the questionnaires are not sorted or easily sorted by the court. In order to determine the reason for persons being excused, a group of 117 questionnaires recently received were tabulated with the following results.

Reason for Excusal at Qualification	Percent
Age over 70	24%
Out of State	39%
Medical	16%
Prior Service	7%
Felony Conviction	1%
Non-Citizen	8%
Deceased	5%
	100%

With 24% of the names selected resulting in a person excused, as given in the previous section, then if 39% of these are for persons out of state, it can be estimated that 9% of the names on the source list are for persons out of state, (24% x 39%).

These categories do not indicate any discretionary excusals which could have an impact on minority representation. Such categories would be financial problems, care of minors etc. This quick analysis indicates that the excuse reasons usually found to reduce minority representation are not being permitted.

When these qualified persons are summoned in to serve, another reduction is seen as some do not report, are excused, etc. A sample analysis of two panels in March and June 1992 gave the following results.

Served	68%
Postponed	19%
No Shows	1% (will eventually be found)
Excused	12%
Total	100%
Reasons for Excuses	
Out of State	2%
On Probation	1%
Medical	4%
Age	1%
Religious Beliefs	.5%
Child Care	2%

Prior Service	.5%
Financial	1%
Total	12%

The 19% of the persons postponed will eventually serve in a later jury term so that the eventual yield is 68% + 19% or 87%. Again, few are excused and very few for reasons which could be related to minority representation, i.e. child care or financial reasons. Again, even if all those persons excused for these reasons served, it would not explain the lack of racial minorities.

4. Is the time interval form the obtaining of the prospective jurors name until summoning of such a length that many persons move and cannot be found?

There is an inherent delay between the time a name is provided to the county by the state and when that person is summoned to serve. It is not a delay caused by inaction but is the time necessary for the various administrative tasks and the time over which that name can be used for summoning. If the name is valid when selected by the state, than this period of time can cause a non-response or undeliverable qualification questionnaire or summons as people move from the community. It inevitably causes few young people unless actions are taken to secure name or persons under 18. While this action is possible, it is administratively difficulty and not recommended at this time.

An examination of the process will show these delays. In March of each year names are requested from the Secretary of State. Names are provided to the county and are translated into a Zip+4 address. This permits the county Information Systems Department to determine in a very unique manner, the exact district court to which that person may be summoned. The persons are then sent a qualification questionnaire which is screened upon being returned.

These names can because available for summoning by September of that year, only 6 months after being received from the Secretary of State. This delay is minimal. As previously reported, about 9% of the names are from persons out of state, 8% to 15% undeliverable and there is no response from 4% to 20% of the persons. At a minimum, 21% of the names selected, do not produce a contact with a person (9% + 8% + 4%).

The accepted or qualified names are used over the next year and the court tries to use all qualified names before others are added. When the court was visited in June 1992, the persons serving at that time were qualified in the fall of 1991 and selected by the Secretary of State in the spring of 1991.

This delay or administrative processing time is not extreme, although if the court qualified as few names as possible each year, yet an adequate number, of course, then the period between selection and service could be minimized. Another method is the use of a combined qualification and summoning procedure, however, the gain in the reduced delay would be slight. The problem is more the accuracy of the names from the source list than it is the loss of accuracy due to the delay between selection and summoning.

5. <u>Is the allocation of prospective jurors to the various courts causing an imbalance such that few minorities are assigned to the Circuit Court?</u>

Persons in Kalamazoo can serve in one of two courts, the Circuit Court and a District Court. There are three district courts in the county, one serving the City of Kalamazoo, one serving the City of Portage and one serving the remainder of the county. The need for jurors in these courts varies and it determined by:

1. The number of jury trials heard in that court.

2. The yield of persons responding to the summons and qualification questionnaire from that portion of the county.

3. The term of jury service in the court.

To illustrate how these factors cause an unbalance, the 9th District, Division 1 asks for 15,000 names, the 8th District Court asks for 11,500 names and the 9th District, Division 1 asks for 1,600 names each year. The city has 40% of the population but requires 53% of the names. The result is that people in the City of Kalamazoo have a greater chance of being selected for jury duty. This is a typical result and seen in many other jurisdictions across the states, and a factor not always considered in the allocation of names to the various courts.

A problem arises in that if the court does not request enough names from the Secretary of State and if names are distributed to the District Court before the Circuit Court, then it is possible that the Circuit Court is not receiving a proper balance of city and no-city residents. Based on discussions with Information Services personnel, this is considered to be the primary reason for the lack of minority representation is the Circuit Court.

This could be corrected by allocating names to the Circuit Court in relation to the population or in relation to the population plus the inclusion of the yield such that persons serving in the Circuit Court properly represent the county population.[1]

It is recommended that names be randomly selected from those supplied by the Secretary of State for the Circuit Court first before being allocated to the

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[1] This could be carried to an extreme by balancing the summoning by age, race, sex, etc. if this were known for each person. This stratified sampling is used in a few jurisdictions in the United States but has not been tested in the appellate courts. This is not recommended for Kalamazoo.

District Courts. This could result in more names being needed each year with only some being used.

Summary

The computer allocation appears to be the primary reason minorities are not serving in Circuit Court. However, the other factors examined could also independently contribute to the problem. While the change in the computer allocation of names is the primary recommendation, the other suggestions given in this report should be considered and the data tabulations particularity of the reasons for persons being excused, which were based on a limited and not necessarily a random sample, should be repeated and regularly tabulated.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff

v

DIAPOLIS SMITH,

Defendant.
_____/

Court of Appeals No. 172558
Circuit File No. 92-60735-FH
Hon. Paul J. Sullivan

FINDINGS OF FACT & OPINION

Appearances:
Timothy K. McMorrow (P25386)
Chief Appellate Attorney
Kent County Prosecuting Attorney
416 Hall of Justice
Grand Rapids MI 49503
(616) 336-3577
James S. Lawrence (P33664)
Attorney for Defendant Smith
One Kennedy Square - Ste 500
Detroit MI 48226
(313) 965-4189
Corinne Beckwith Yates (P47463)
Attorney for Defendant Palmer on Case 93-63788-FH, consolidated with 92-60735 (Judge Dennis Leiber)
State Appellate Defender Office
340 Business and Trade Center
200 Washington Square, North
Lansing, MI 48913
(313) 256-9833

This case involving Diapolis Smith, and another case (People v. Robert Palmer - 93-63788-FH) were remanded by the Court of Appeals for a hearing concerning the

propriety of jury selection procedures in place at the time. Mr. Smith was convicted by a jury selected in September 1993 of second degree murder and felony firearm. He was sentenced to prison for life, plus two years consecutive.

By Order of May 14, 1997, the Court of Appeals remanded both cases to the Kent Circuit Court for a consolidated evidentiary hearing on the claim that defendants were denied an impartial jury. The hearing extended over two days, February 2 and April 27, 1998. Judge Dennis Leiber (Palmer case) and the undersigned Judge Paul Sullivan (Smith case as successor to Judge Michael Smolenski) jointly presided over the hearings. This Opinion deals only with the Smith case. Judge Leiber will be issuing a separate Opinion on the Palmer matter.

While the Smith jury was selected b September 1993 and the Palmer jury in the following term, the procedures and court personnel involved were significantly different. The Smith jury was chosen during the last month of the 1992-93 jury term. Accordingly, the procedures utilized in Smith initially were carried out by former Circuit Court Administrator James Dykema. Current Administrator Kim Foster was in part responsible for the design and implementation of procedures relating to the Palmer case.

The Court has some concern about the reliability of testimony from Mr. Foster as to procedures in effect when jury lists were being compiled for the panel used in Mr. Smith's case. On several occasions he indicated his lack of knowledge or involvement concerning procedures prior to the October 1993 panel. However, some testimony was elicited concerning his "understanding" of the procedures in use at the time. The People did not object to such testimony and, while also imprecise as to dates and times, testimony of Chief Defender Richard Hillary arguably provided support to the contention that in September 1993 jurors were first assigned to district

courts, with circuit court only utilizing those not assigned to district court panels. Accordingly, albeit reluctantly, the Court will accept such "understanding" as factual. Note that starting with the panel first utilized in October 1993, jurors were selected first for circuit court service, and then for the district courts.

Selection of district court jurors from the jury pool prior to selection of circuit jurors arguably could present serious problems. A similar procedure in Kalamazoo County was deemed to be violative of the Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. People v. Hubbard (after remand), 217 Mich App 459 (1996). This Court has serious concerns about such a procedure and its potential impact upon the availability of minority jurors for circuit court service. In fact, such concerns likely resulted in the revised procedure which went into effect the following month, and which resulted in jurors first being chosen for circuit rather than district service. Per the 1990 census, the City of Grand Rapids had a population of 189,126, of which 18.5% were black. For the same period, the population of Kent County was 500,631, of which 8.1% were black. (Defense Exhibits A&B). Therefore, defendant has established that the percentage of minority residents is significantly higher in the City of Grand Rapids (61st District Court) than in the rest of Kent County. Thus, if the 61st District Court had need for significantly more jurors than the other district courts in the county, it could properly be argued that minority representation on circuit jury panels would be adversely affected.

This Court is sympathetic with defendant's position. Depending upon a variety of circumstances, this Court would likely hold in the same or similar way the Kalamazoo Circuit Court held in Hubbard, supra. Unfortunately for defendant, however, and despite voluminous evidence having been presented by his

learned counsel who obviously has put considerable time and effort into this case, this Court is left to speculate on important facts needed for a reasoned decision in support of defendant's position. We do know from the evidence that there are twelve district judges in Kent County, and that six of them serve in the 61st District Court. We simply do not know whether the number of jurors used in the 61st District Court is greater than, less than, or roughly equal to the pro-rata number used in other district courts in the county. In the absence of substantial pro-rata differences in the number of jurors summoned for out county districts in relation to 61st district, there would be no problem.

Apparently this court is being asked to presume that more jurors are used in the 61st District Court than in other districts. There is little evidentiary basis for such presumption, and this Court must rely upon evidence, not conjecture. Even were this court to improperly assume higher caseloads, more jury trials, more criminal trials, etc. in tile urban 61st District Court, the record is devoid of evidence concerning jury selection procedures in the various districts. All that is known (through hearsay testimony of the current court administrator) is that each district informed the Circuit Court of how many jurors would be needed for that particular district over the coming year. Even were caseloads significantly different, some districts could have used the same jurors for a number of different trials, while others may have used jurors for one trial only. Similarly, some districts might have employed procedures more likely to encourage guilty pleas or bench trials. Evidence has not been presented as to how many jurors each of the respective districts needed for the period in question, in relation to other districts. Without such evidence, one cannot legitimately conclude the existence of a process that unfairly drained minority jurors from the circuit pool.

Pursuant to Duren v. Missouri, 439 US 357 (1975), for defendant to prevail on his 6th Amendment claim of systematic underrepresentation of minorities on Circuit Court juries, he must establish:

1. That the excluded group is a "distinctive" group in the community;

2. That the representation of this group in the venue from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

3. That this underrepresentation is due to systematic exclusion of the group in the jury selection process.

There is little doubt that African-Americans are a "distinctive" group as envisioned by Duren. Defendant has adequately established that his claim involves this distinctive group. Similarly, defendant has established to this Court's satisfaction that there appears to have been an underrepresentation of blacks on the jury. Of 37 prospective jurors examined prior to trial, the record reflects that none were African-A This is highly suspect in view of the population figures set forth above and in Exhibit B. In Kent County, 8.1% of county residents are black. Generally, one would expect that approximately 3 of the 37 prospective jurors would have been black. The fact that none were is not necessarily dispositive of that issue. In fact, even had it been established that absolutely no African-American jurors were in the array, such would not, standing alone, be sufficient to sustain a challenge to that array. People v. Flowers, 222 Mich App 732 (1997). In the instant case, however, the court has been presented with extensive data through defendant's statistician, Dr. Stoline. This data covered not only the panel in question, but other panels during that particular jury term. Frankly, there appears to have been rather consistent underrepresentation.

Having concluded the existence of such underrepresentation, the Court must now address whether same constituted "systematic exclusion." Defendant presented Kurt R. Metzger, Director of the Michigan Metropolitan Information Center at Wayne State University. Mr. Metzger noted historical problems relating to undercounting of minorities at time of census taking. He opined that such undercounts were the result of some factions of the community being more mobile than others. Renters and unmarried individuals move more often than homeowners or married people, and he further testified that Black Americans are more likely than Caucasian Americans to be single, and to be renters. Other observations included that African-American males more often then their white counterparts would be imprisoned or otherwise unqualified to serve as jurors, that for economic reasons they would be more likely to seek amid receive excuses from jury service, and that they would be more likely to lack basic transportation to get to and from the court house for jury service.

The above opinions seem plausible. Nonetheless, they are little more than opinions of possible reasons why statistical evidence seemed to demonstrate underrepresentation. Sending jurors to "busy" district courts and thereby deleting minorities from circuit jury panels, clearly could be a reason for such underrepresentation. If that had been proven [it was not, in this court's opinion], such would have been a systematic problem unrelated to action or inaction on the part of persons outside the system. Despite this circuit's good faith efforts to devise permissible procedures to lessen the possible effect of such factors (economic, marital status, mobility, etc), the simple fact remains that any perceived shortfall is based upon factors outside the system itself At the very least, defendant has been unable to prove with any reasonable degree of probability why such disparity exists and/or, to the

extent it does exist, whether the reason for same is systematic or based upon factors outside the control of the system.

Again, this Court is very sympathetic with defendant's complaints. This Court should not have to decide this important issue based upon mere speculation, however. Unfortunately, this is what it is being asked to do. Speculation is dangerous and totally unreliable. During the hearing, the prosecutor referred to the Circuit Court Jury Selection Process Manual which he suggested both judges could take judicial notice of because both were signatories to it. However, in reviewing People's Exhibit 2, the actual manual, same was approved a few months before the undersigned assumed his position as circuit judge. In other words, it was not signed by this judge. And the Court will take judicial notice of the fact that it had never seen this document until its receipt into evidence at time of the hearing. Similarly, the hearsay testimony about procedures in place at the time the Smith jury was selected, and upon which defendants wish this court to rely, has been shown to be less than reliable. Mr. Foster assumed that individual hardship requests for jury excuses were decided upon by the Chief Circuit Judge or Court Administrator. When Ms. Orlikowski testified, however, she indicated that at the time relevant to this case, such excuses were considered and decided upon by the jury commissioners. These are not earth shaking discrepancies, nor are they representative of any intention on the part of one side or the other to misrepresent facts. They are merely illustrative of the reason why courts need rely upon something more than speculation when making the kinds of decisions being asked of it today.

For all of the above reasons, this Court holds that defendant Smith has failed to establish the existence of systematic exclusion of African-Americans in the jury selection process in place when he was tried and

convicted. If such a problem exist - which this Court unfortunately concedes may have been possible - defendant has failed to satisfy its burden in that regard.

DATED: June 8, 1998 /s/Paul J. Sullivan
Paul J Sullivan,
Circuit Judge
(P-24139)

PJS/s

PETITIONER'S BRIEF

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No. 08-1402 (6)

Supreme Court, U.S.
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In the Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

v.

DIAPOLIS SMITH

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CORRECTED BRIEF FOR PETITIONER

2009 U.S. S.Ct. Briefs LEXIS 1165

Michael A. Cox
Michigan Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Timothy K. McMorrow
Special Assistant Attorney General
Appellate Chief
Kent County Prosecutor's Office

Attorneys for Petitioner

BOTH SAJZSQ

QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair-cross-section requirement under *Duren v. Missouri,* 439 U.S. 357 (1979) where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community compared to the venires), which this Court has never applied and which four circuits have specifically rejected.

PARTIES TO THE PROCEEDING

Petitioner is Mary Berghuis, Warden of the West Shoreline Correctional Facility in Michigan. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit. This brief refers to Petitioner as the State of Michigan, because the State represents the interests of the warden here.

Respondent is Diapolis Smith, a prisoner in a State correctional facility in Michigan. Respondent was the petitioner-appellant in the Sixth Circuit.

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The decision of the Sixth Circuit, *Smith v. Berghuis,* reversing the district court's denial of habeas corpus relief is reported at 543 F.3d 326 (6th Cir. 2008). Pet. App. 1a-36a. The decision of the Michigan Supreme Court in *Michigan v. Smith* is reported at 463 Mich. 199; 615 N.W.2d 1 (2000). Pet. App. 144a-173a.

JURISDICTION

On February 9, 2009, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that Michigan asked the Sixth Circuit to rehear was entered on September 24, 2008. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, including the relevant provisions under the Antiterrorism and Effective Death Penalty Act (AEDPA), are reproduced in an appendix to this brief. J.A. 1a-2a.

STATEMENT OF THE CASE

Diapolis Smith was convicted of second-degree murder after a jury trial that occurred in Kent County, Michigan in September and October 1993. Smith was sentenced to life imprisonment with the opportunity for parole. He filed a post-trial motion in which he challenged the fairness of the composition of his venire under the Sixth Amendment. The Michigan Supreme Court rejected this claim, but in federal habeas corpus the Sixth Circuit determined that this decision was an unreasonable application of existing United States Supreme Court precedent, reversed the district court's denial of habeas corpus relief, and remanded the matter to the district court to issue an order directing the State to either release Smith or retry him within 180 days.

The factual claims in the case and the lower court decisions are predicated on an understanding of *Duren v. Missouri*, which established the controlling standard for determining whether the fair-cross-section requirement is met under the Sixth Amendment.[1] In *Duren*, this Court established a three-pronged test:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show
>
> (1) that the group alleged to be excluded is a "distinctive" group in the community;

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[1] *Duren v. Missouri*, 439 U.S. 357 (1979).

> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[2]

Under the second prong, the review requires "a comparison of the makeup of jury venires" with the "makeup of the community."[3]

In reviewing fair-cross-section claims, the federal appellate courts have adopted three separate tests for evaluating the significance of the disparity at issue under the second prong: (1) the absolute-disparity test; (2) the comparative-disparity test; and (3) the standard-deviation test.

The absolute-disparity test measures this value by subtracting the percentage of adult members of the distinct group in the venires during the time period at issue from the percentage of members of the distinct group in the community.[4]

By contrast, the comparative-disparity test seeks to measure the "diminished likelihood" that a member of a distinct group will be a member of the jury pool due to the underrepresentation.[5] It is calculated by dividing the percentage of absolute

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[2] *Duren*, 439 U.S. at 364.

[3] *Duren*, 439 U.S. at 365 n. 23.

[4] *See*, e.g., *Ramseur v. Beyer*, 983 F.2d 1215, 1231-1232 (3d Cir. 1992)(describing all three tests).

[5] *Ramseur*, 983 F.2d at 1231-1232.

disparity by the percentage of the distinct group in the community.[6] In other words, it captures what fraction of the distinct group was missing from the venires.

Finally, regarding the standard-deviation standard, this Court provided a description of this standard in its decision in *Castaneda v. Partida*, when examining the claim of purposeful exclusion from the venire under the Equal Protection Clause.[7] The calculation is complex, but it is based on the idea that there will be normal fluctuations above and below the number of jurors of a distinct group that one would expect to draw if the pool drawn reflected the broader community. This is the standard deviation. Where the variation exceeds the standard deviation by more than a factor of two or three, the magnitude of the variation suggests that the difference is non-random.[8]

1. The Crime and the Trial

Christopher Rumbly was murdered when he was shot in the chest at a bar on November 7, 1991 in Grand Rapids, Michigan. In 1993, Diapolis Smith was charged with the crime and his three-week trial was conducted in September and October of 1993. Pet. App. 55a.

There were a total of 37 witnesses who testified at trial. According to one of the eyewitnesses to the shooting, Katherine Brown, a fight broke out between Smith's friend and the victim, and Smith then grabbed the victim by the collar and shot him. Pet. App. 57a. A

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[6] *See Ramseur*, 983 F.2d at 1231-1232.

[7] *Castaneda v. Partida*, 430 U.S. 482, 486 n. 17 (1977).

[8] *See Castaneda*, 430 U.S. at 486 n. 17.

second witness, Dorothy Brown, heard the shot and saw Smith "standing right over [the victim]." Pet. App. 59a. A third witness, Laura Dean, had seen Smith draw a gun and explained that the shot came from Smith's direction. Pet. App. 60a. The victim died from a single gunshot wound to the chest. Pet. App. 66a.

The jury deliberated for four days before reaching its verdict, finding Smith guilty of second-degree murder. Smith was then sentenced to life imprisonment.

2. The Jury Composition and Post-Trial Motion

a. The Selection Process

During voir dire, Smith's attorney noted that there were very few African Americans in the venire and after the jury had been selected, counsel for Smith asked for additional peremptory challenges. J.A. 6a. The request was denied. A total of 37 jurors were considered during voir dire, 14 of whom were seated for the jury. All of those 37 were white. Pet. App. 86a. The attorney estimated that only two or three of the jury venire were African Americans, and guessed that there may have been as many as 100 persons in the jury venire. J.A. 6a. In contrast, the trial court indicated that it had only requested 60 prospective jurors for the jury venire, but the court believed that there were three African Americans in the jury venire. J.A. 7a. Smith's attorney challenged the venire based on constitutional grounds. J.A. 7a.

Smith then raised this claim in a post-trial motion, claiming that his jury was not drawn from a

fair cross section of the community in violation of his rights under the Sixth and Fourteenth Amendments. The Michigan Court of Appeals remanded the matter to the State trial court, which held an evidentiary hearing over two days.

Because the trial here was conducted in September and October 1993, the relevant jury-selection processes were those in place during the court's October 1992 through October 1993 term (the "October 1992 term"). At the evidentiary hearing, the Kent County Court Administrator, Kim Foster, outlined the process by which the county selected prospective jurors from October 1993 through October 1994 (the "October 1993 term"). J.A. 13a, 20a. This description governed the process for the selection of the jurors for the previous term except where Foster indicated that the procedure had changed between the two terms.

In the October 1992 term, the Secretary of State drew a "master list" of 350,000 prospective jurors from the driver's license list and Michigan identification cards. J.A. 10a-11a. This is consistent with Mich. Comp. Law. § 600.1304. The Secretary of State then reduced that number randomly to 50,000, transmitting this list to the county.[9] Neither this list, nor the master list, included a person's race. J.A. 29a. The 50,000 figure was based on the number of prospective jurors the Court Administrator anticipated would be needed to cover all of the courts in the county, both

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[9] Starting in the October 1993 term, the county would receive the master list of 350,000 and would reduce the list randomly to 50,000 on its own. J.A. 22a.

circuit courts (county felony courts) and district courts (city misdemeanor courts). J.A. 29a.

The county then sent out a questionnaire by regular mail to all the names on the list of 50,000, which the prospective jurors were requested to fill out and return to the county. Four to five percent of these questionnaires typically would be returned as "undeliverable." J.A. 12a-13a. The county took no further action on these questionnaires. Another 15 to 20 percent of these questionnaires elicited no response from the prospective juror. J.A. 13a. In reaction to this "no response," the county would send a second letter containing "another qualifying questionnaire" and a letter from the chief judge encouraging a response and identifying the penalties for failing to respond. J.A. 13a-14a. There was a 50% return rate from this follow-up letter.[10]

From the returned questionnaires, the county established a "qualified juror list." J.A. 15a. "If a person responding to a questionnaire claimed a statutory exemption, the person was not placed on the [qualified] juror list. The county did some checking of exemption claims, depending on resources, but for the most part relied on the person's word." Pet. App. 87a. A person was statutorily exempt if that person was not a resident of the county, could not speak English, was unable to physically or mentally carry out the functions of a juror, had been a juror within the last

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[10] For the "no responses" for which the second letter did not elicit a response, the county would set a "show-cause hearing" and a show-cause order would be sent. But law enforcement would not serve any warrants that arose from these show-cause hearings for those who failed to appear because there was inadequate identifying information for the police. J.A. 14a.

twelve months, or was currently under sentence for a felony. J.A. 14a-15a. A prospective juror could also avoid juror service if that person was over the age of 70 years and claimed the exemption. J.A. 15a. This was consistent with Mich. Comp. Law. § 600.1307a, which provides the qualifications of a juror.[11]

The county then reduced the qualified juror list randomly to 12,000, and this was known as the "second list." J.A. 17a. With this list, the county then sent out a summons along with a personal-history questionnaire six or eight weeks before the county would ask that prospective juror to report for service. In response to this questionnaire, these prospective jurors could raise excuses for being unable to serve based on considerations other than those provided by statute, including child care, transportation, and work considerations. J.A. 21a.

In attempting to explain why prospective African American jurors might be more likely to request non-statutory excuses, Smith called Kurt Metzger, the director of the Michigan Metropolitan Information Center at Wayne State University. Metzger provided information from the U.S. census data for Kent County from 1990 that 64% of African American families were headed by a single parent as compared to only 19% of white families. J.A. 80a. Related to work considerations, he testified that the poverty rate for African Americans was 31.5%, while it

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[11] This statute was amended in 2002 and 2004. The only significant substantive change was to expand the exclusion of felons from those "under sentence" to anyone "convicted of a felony." Mich. Comp. Law § 600.1307a, as amended by Public Act 2002, No. 738, effective October 1, 2003.

was 6.7% for whites. And with regard to transportation, he said that 30% of African American households reported not having a vehicle compared to 6% of white households. J.A. 81a-82a.

The State trial court also heard testimony regarding the assignment of jurors between the circuit courts and the district courts. There were two changes made in the process for selecting prospective jurors in the October 1993 term from the previous term. The Court administrator, Kim Foster, explained that the county began to receive all 350,000 names from the Secretary of State. J.A. 22a. Foster said that the county also discontinued its practice of allowing the prospective jurors to be selected by the district courts first but rather selected the prospective jurors for the circuit courts first. J.A. 20a. Foster noted that this decision was rooted in the perception that the assignment to the district courts had disproportionately reduced the number of minority jurors left for service for the circuit courts:

> The belief was that the respective districts essentially swallowed up most of the minority jurors, and the Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just – it represented certain portions of the county. [J.A. 22a.]

Similarly, on this point, Richard Hillary, the director of the Kent County Public Defender's Office testified that he had co-chaired the Jury Minority Representation Committee formed in 1992 or early 1993 to investigate the reason for the "lack of minorities" on jury venires. J.A. 60a. Hillary stated

that the committee "made a determination that we were losing minorities by choosing the District Court jurors first and not returning the unused ones . . . to the pool that the Circuit Court was taken from." J.A. 64a-65a. Hillary did not, however, explain how this determination was made.

b. The Claim of Disparity

Michael Stoline, a statistician employed by Western Michigan University, presented testimony regarding the statistical information underlying Smith's claim of disparity. At the first day of the hearing, Stoline testified exclusively about the juror pools from October 1993 through October 1994. J.A. 35a. He was provided a list of 2,252 juror names for that time period. J.A. 35a. Using the 1990 Kent County census figures, the county was divided into 112 census tracts. Each tract included the numbers of African Americans, white Americans, and the number of others that are neither African American nor white. J.A. 38a.

According to the 1990 census information, Kent County was comprised of 89.8% white citizens between the ages of 18 and 69 (289,704) and 7.28% African American citizens between the ages of 18 and 69 (23,476). J.A. 172a. The total numbers of adults in that age range was 322,383. J.A. 172a. The City of Grand Rapids is the largest city in Kent County, comprising about one-third of the county's population. According to 1990 census figures, the City of Grand Rapids was 18.5% African American and comprised 85% of the total number of African Americans who lived in the county. J.A. 197a; Pet. App. 29a.

Stoline had no information about the race of the 2,252 prospective jurors that were summoned by Kent County for the October 1993 term. J.A. 43a. Rather, Stoline used calculations from the numbers of prospective jurors summoned from each of the 112 census tracts predicated on the premise that they were representative of the racial proportions of each tract. He explained the point:

> [I]f a census tract has five percent blacks and 95 percent non-blacks, that if you have 20 people being selected from that census tract, okay, that are on the jury list, you'd expect five percent of those people to be black, so that would be five percent of 20 [is] one, you'd expect one black on that list. [J.A. 43a-44a.]

Relying on the 1990 census information that 7.28% of the adult population in Kent County was African American, Stoline concluded that one would have expected to have 164 African American prospective jurors from October 1993 to October 1994 (7.28% of 2,252 prospective jurors summoned). Then, using the racial percentages from each of the 112 census tracts, Stoline estimated that there would have been only 139 African American prospective jurors, assuming that the prospective jurors reflected the racial composition of the tract from which each was selected. J.A. 42a.

In this way, he determined that there was an "under-representation" of 15% during the October 1993 term. This was calculated by subtracting the estimated 139 prospective African American jurors (using the individual census tract figures) from the estimated 164 prospective African Americans jurors

(7.28% of 2,252 prospective jurors), and then dividing the result of 25 by 164. J.A. 37a, 41a-42a.[12] He explained that this difference results from an "over-representation" of prospective jurors from census tracts with small percentages of African Americans and from an "underrepresentation" of prospective jurors from census tracts with larger percentages of African Americans. J.A. 39a-40a, 42a.

Stoline provided the same analysis for the time period of April 1993 to October 1993, the time period during which Smith's trial occurred. He estimated that there was an 18% comparative disparity for this six-month period. J.A. 112a-113a. Using the same "techniques of estimation," he contended that of the 929 prospective jurors summoned during this time period, he estimated that 55.4 were African American (relying on the census tract information), when there should have been 67.6 African American prospective jurors (7.28% of 929 total prospective jurors). J.A. 112a-115a, 181a. The 18% figure was calculated by dividing the difference between the projected African American jurors from the census tracts (12.2) by the expected African American (67.6).[13]

This same information would yield a 1.28% absolute disparity for the time period. This is determined by using the absolute percentages: it is the difference yielded from subtracting 6%, which is the percentage of estimated African Americans in the

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[12] Specifically, the numbers from Stoline's report were 164.1 expected African American prospective jurors and 139.4 estimated African American jurors, with a difference of 24.7. This calculation results in a 15.1% comparative disparity. J.A 102a.

[13] 12.2 is the difference between 67.6 and 55.4.

venire (55.4 is 6% of 929) from 7.28% (total percentage of African Americans in the adult population.

Stoline divided this six-month time period into six four-week samplings for the April 1993 through October 1993 time period. The final time period corresponded to the month in which this trial was conducted (listed as item #12):

	Expected Numbers	Estimated Actual Numbers	Difference	Comparative Disparity
7.	10.6	7.7	-2.9	-27.4
8.	11.4	12.3	0.9	+7.9
9.	10.9	6.3	-4.6	-42.2
10.	11.2	10.7	-0.5	-4.4
11.	12.0	10.9	-1.1	-9.2
12.	*11.5*	*7.5*	*-4.0*	*-34.8*
Totals:				
	67.6	55.4	-12.2	-18.0

[J.A. 181a (emphasis added).]

In other words, based on his calculations, there should have been 11.5 African American prospective jurors during this final month, but there were only 7.5, a shortfall of 4 African American jurors for this four-week period. The total number of jurors for that month would then have been 158 jurors (as rounded). J.A. 121a. Stoline calculated this as a disparity of 34.8%, by dividing 4 by 11.5 (4 is the difference between 11.5 and 7.5). J.A. 181a.

The only statistical information presented at the hearing that corresponded to the conclusion that the assignment to district court reduced the number of African American prospective jurors in Kent County indicated that there was an 18% comparative disparity of African American jurors for the time period of April 1993 through October 1993 when the district courts were filled first, and a 15% comparative disparity of African American jurors from October 1993 through October 1994 when the circuit courts were the first to select prospective jurors. J.A. 102a, 181a.

3. The State Courts

The State trial court rejected the claim that the Kent County prospective jury was not drawn from a fair cross section of the community. Although the trial court determined that African Americans were a distinct group and that there was a constitutionally-significant disparity, it found that Smith had failed to show that the reason for the underrepresentation was based on the sending of prospective jurors to the district courts first. J.A. 200a. Rather, the trial court determined that the disparity might have resulted from factors outside the system itself – the economic and social factors given by Kurt Metzger – but that these would relate to problems "outside the system itself" of the jury-selection process. J.A. 200a.

In a 2-to-1 decision, the Michigan Court of Appeals reversed, concluding that there was significant underrepresentation of African American jurors and this underrepresentation was the result of systematic exclusion inherent in the process. Pet. App. 174a-201a.

The Michigan Supreme Court then unanimously reversed the Court of Appeals in majority and concurring opinions. Pet. App. 144a-173a.

In its decision, the Michigan Supreme Court held that Smith had not shown "systematic exclusion" but "granted him the benefit of the doubt on unfair and unreasonable underrepresentation." Pet. App. 144a-145a. The Court explained that it decided to "give the benefit of the doubt on underrepresentation" in order to avoid "leaving the possibility of systematic exclusion unreviewed." Pet. App. 146a-147a.

Addressing the second prong of *Duren,* the Michigan Supreme Court considered all three tests for measuring whether there was fair and reasonable representation and found that there was no legally significant disparity. Pet. App. 146a. After noting that each method had been criticized, the Michigan Supreme Court determined that "no individual method should be used exclusive of the others," and adopted a case-by-case approach. Pet. App. 146a. Because there was inadequate evidence on the standard-deviation test, the Michigan Supreme Court addressed only the absolute and comparative disparity tests, determining that there was no legally significant disparity. Pet. App. 146a.

With regard to the third prong of *Duren*, the Michigan Supreme Court rejected the claim of systematic exclusion by determining that Smith had failed to show how the alleged "siphoning" of jurors to the district courts affected the circuit court jury pool. Pet. App. 147a. The Court also concluded that the influence of economic and social factors did not demonstrate a systematic exclusion. Finally, in

addressing the question whether statistics alone can make a requisite showing, the Court again stated that Smith had not demonstrated "unfair and unreasonable underrepresentation under the disparity analyses." Pet. App. 148a. Thus, the Michigan Supreme Court "concluded that defendant has not established a prima facie violation of the Sixth Amendment fair-cross-section requirement." Pet. App. 148a-149a.

4. The Federal Courts

On habeas corpus review, the federal magistrate entered a report and recommendation that recommended that the writ for habeas corpus be denied. Pet. App. 52a-143a. The district court adopted this recommendation. Pet. App. 39a-51a.

On appeal, the Sixth Circuit reversed, concluding that the Michigan Supreme Court's application of *Duren* was objectively unreasonable. Pet. App. 17a. The Sixth Circuit addressed the Michigan Supreme Court's conclusions on the second and third prongs of *Duren* separately.

For the second prong, the Sixth Circuit noted that the Michigan Supreme Court applied a number of different measures of underrepresentation and then "rejected these disparities as constitutionally insignificant." Pet. App. 18a. The Sixth Circuit further stated that under the absolute-disparity test the underrepresentation was "negligible" but found that such a test was "questionable" when measuring a small minority population. Pet. App. 19a-20a. Relying on the comparative-disparity test, the Sixth Circuit determined that the representation of African American veniremen "at the time of [Smith's] trial was

unfair and unreasonable." Pet. App. 21a. On this basis, the Sixth Circuit determined that Smith had "established that African Americans were underrepresented on Kent County venire panels." Pet. App. 21a.

The Sixth Circuit then stated that under AEDPA, the Michigan Supreme Court's analysis would have to be more than just "incorrect"; it would have to be "unreasonable." Pet. App. 21a. After noting again that the Michigan Supreme Court found that Smith's statistical figures did not demonstrate significant underrepresentation, the Sixth Circuit determined that "none of the applicable tests can appropriately measure the underrepresentation" in Kent County because of the relatively small size of the African American population. Pet. App. 22a. Rather, the Sixth Circuit concluded that the Michigan Supreme Court "properly" reached the third prong of *Duren* since there was "significant underrepresentation" that would not otherwise meet the *Duren* test but for the fact that there were "non-benign factors" operating to produce them." Pet. App. 22a.

With regard to the third prong of *Duren,* the Sixth Circuit concluded that the Michigan Supreme Court "unreasonably" applied federal law on this issue of systematic exclusion. Pet. App. 25a. The Court determined that the "persistent disparity" combined with Smith's evidence that the disparity was not random was "sufficient to establish systematic exclusion" under *Duren.* Pet. App. 25a. The Sixth Circuit accepted that there were two non-random factors.

First, the Sixth Circuit determined that the "opt out" of jury services for excuses based on child care, transportation, or work considerations were "inherent in the particular jury-selection process." Pet. App. 26a-27a. This conclusion was predicated on the fact that the Sixth Amendment is "concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list" and ultimately called for service. Pet. App. 28a.

Second, with regard to the process by which jurors were first selected for district court and then assigned to circuit court, the Sixth Circuit noted the anecdotal testimony of Richard Hillary, Director of the Public Defender's Office, and Kim Foster, the Kent County Court Administrator, that the perception was that this process caused the loss of minority jurors for the circuit court. The Sixth Circuit found this evidence combined with the duration of underrepresentation "demonstrates that such underrepresentation came as a consequence of a factor that was inherent in the jury assignment system." Pet. App. 30a.

After concluding that the Michigan Supreme Court unreasonably failed to determine that Smith had established his prima facie case, the Sixth Circuit then applied the test to determine that there was a significant State interest that supports the process resulting in the exclusion. The Sixth Circuit determined that there was a significant interest of the State in allowing excuses for hardships, but that there was no significant interest in assigning prospective jurors to the State district courts first. Consequently, it concluded that Smith had shown a violation of the Sixth Amendment and granted Smith habeas relief.

SUMMARY OF ARGUMENT

The Sixth Circuit was wrong in reversing the Michigan Supreme Court decision under AEDPA because the Michigan Supreme Court's ruling was not unreasonable in its application of the second or the third prong of the *Duren* test.

Under the second prong of *Duren*, the Michigan Supreme Court's ruling was not unreasonable that there was no unconstitutional underrepresentation of African American jurors. While *Duren* did not identify any particular test for measuring the disparity between the number of distinct persons in the venires and the number of such persons in the community, it appeared to apply the absolute-disparity test. And the absolute disparity at issue here was only 1.28% during the six months at issue between African Americans in the community (7.28%) and the jury venires (6%). As even the Sixth Circuit itself noted, this was negligible. In fact, seven circuits that have reviewed this issue have rejected Sixth Amendment claims based on similar disparities on direct review. Thus, the Michigan Supreme Court's determination that there was no legally significant disparity was not an unreasonable application of clearly established Supreme Court precedent.

Even if this Court reviews the issue without regard to AEDPA, the Sixth Circuit's decision was still wrong. The facts in this case demonstrate that the application of the comparative-disparity standard is unworkable. It exaggerates small disparities. And it calls into question reasonable, neutral means of drawing jurors. If such a standard were adopted, the only way a State could avoid subjecting its processes to

challenge would be to use a system that requires the identification of every person's race and ethnicity to ensure that the venires match the percentages for distinct groups in the community. The Constitution does not require this. Even applying the comparative-disparity test here, the small disparities did not violate the fair-cross-section requirement because they did not undermine the paramount principle at issue under the Sixth Amendment – the right to an impartial jury. The venires were not comprised only of special segments, but were adequately representative of the community. Smith's right to an impartial jury was not violated.

Moreover, under the third prong of *Duren,* the Michigan Supreme Court's determination that Smith had failed to show systematic exclusion under the third prong of *Duren* was not objectively unreasonable. There is no clearly established Supreme Court precedent that indicates the processes at issue here – allowing excuses for hardship or selecting jurors for local courts first – are inherently exclusionary processes. The system that Kent County employed here was facially neutral and reasonable. The Sixth Circuit's conclusion – by allowing prospective jurors to claim hardship to be excused from jury service inherently excludes certain jurors – is wrong and is not required by *Duren.* With regard to the assignment of the jurors to the local courts first, the Michigan Supreme Court's finding that Smith had failed to carry his burden was supported by the record. The Sixth Circuit's overturning of findings of fact by the trial court based on competing anecdotal testimony is not consistent with this Court's jurisprudence. The jury selection process here did not systematically exclude any distinct groups. It was not improper.

ARGUMENT

I. There was no unconstitutional underrepresentation under the second prong of *Duren*, and the Michigan Supreme Court's determination on this point was not unreasonable.

The Michigan Supreme Court determined that the underrepresentation of African Americans on Smith's jury venire was 1.28% as measured by absolute disparity, and 18% as measured by comparative disparity. That Court then concluded that neither measurement showed that African Americans' representation on the venire was "not fair and reasonable in relation to the number of such persons in the community," as required by *Duren*'s second prong. The Sixth Circuit erred in rejecting that holding.

First, a federal court may not grant habeas relief under AEDPA on a State-court merits ruling unless that ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]" under 28 U.S.C. § 2254(d)(1). The Michigan Supreme Court ruled on the merits of the second prong, even though it went on to give Smith "the benefit of the doubt" on that issue so that it could also reach *Duren*'s third prong. And given the limited guidance this Court has provided on the proper test for measuring underrepresentation and what disparities meet the second prong, the Michigan Supreme Court's ruling cannot be said to have contravened clearly established Supreme Court precedent.

Second, even if the Michigan Supreme Court's ruling on the second prong is reviewed without AEDPA deference, the Sixth Circuit's decision was wrong. Smith did not establish his prima facie case based on the small disparities at issue here. There is no ground upon which to conclude that Smith was deprived of an impartial jury under the Sixth Amendment. He was fairly convicted of murder.

A. The Michigan Supreme Court's ruling that there was no legally significant disparity was not an unreasonable application of clearly established United States Supreme Court precedent under 28 U.S.C. § 2254(d).

No one disputes that the absolute disparity found here – only 1.28% — was negligible and would not satisfy the second prong of *Duren* if the absolute-disparity test is the proper test. But the decisions from this Court providing guidance on unfair and unreasonable representation are *Duren* and *Taylor v. Louisiana*,[14] neither of which specified the standard for measuring what constitutes unfair and unreasonable representation. In fact, *Duren* appeared to apply the absolute-disparity test. The Michigan Supreme Court's holding on the second prong therefore could not have conflicted with clearly established Supreme Court precedent, as no decision of this Court clearly establishes that the absolute-disparity test should not be used.

Nor does any "clearly established" law from this Court establish that an 18% comparative disparity

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[14] *Taylor v. Louisiana*, 419 U.S. 522 (1975)

meets the second prong of *Duren*, even if that test were required. In fact, seven circuits have reviewed similar disparities for small distinct groups and rejected these claims under the second prong of *Duren* on direct review. Because the Michigan Supreme Court's rejection of Smith's second-prong argument did not conflict with, or unreasonably apply, "clearly established" Supreme Court precedent, AEDPA required the Sixth Circuit to defer to that ruling.

1. The Michigan Supreme Court decision resolved the second prong of Duren on its merits and was entitled to deference under AEDPA.

Under 28 U.S.C. § 2254(d), once a State court reaches the merits of a constitutional question, a federal court may grant relief only when that decision is contrary to or involved an unreasonable application of clearly established Supreme Court precedent. This rule applies even where the State court evaluates a question on the merits on an alternative analysis.[15] That is what occurred here.

The Michigan Supreme Court held that there was no showing of systematic exclusion, but gave

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[15] *See Hammond v. Hall*, No. 08-11108, 2009 U.S. App. LEXIS 24209, at *98-104 (11th Cir. Nov. 4, 2009)(State court adjudication of ineffective assistance of counsel claim entitled to deference on both prongs where State trial court rejected claim on performance prong and State Supreme Court left that finding undisturbed and affirmed by rejecting claim on only prejudice prong). This contrasts with the circumstance where the State court only addresses the merits on one of the prongs of the test. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Smith the benefit of the doubt on the second prong. The Court made clear, however, that it only granted Smith this benefit in order to avoid leaving the third prong "unreviewed." Pet. App. 146a-147a. Substantively, the Michigan Supreme Court directly addressed the issue on the second prong and rejected the claim:

> [D]efendant presented some evidence of a disparity between the number of jury-eligible African-Americans and the actual number of African-American prospective jurors selected to the Kent County Circuit Court jury pool list. However, defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests. [Pet. App. 146a.]

The conclusion that the State court relied substantively on its finding regarding disparity as an alternative basis is borne out by the Michigan Supreme Court's reliance on this analysis in the third prong of *Duren*. The Michigan Supreme Court expressly rejected the statistical claim of systematic exclusion based on Smith's failure to make a showing of unfair and unreasonable representation under *Duren*. Pet. App. 148a. The Court then went on to the third prong only "assuming" that the other prongs had been met. Pet. App. 147a. That does not nullify the fact that the Michigan Supreme Court rejected Smith's second-prong arguments on its merits.

The Sixth Circuit also appeared to have agreed that the Michigan Supreme Court's decision rejecting the second prong claim was a merits decision entitled

to deference under AEDPA. The Sixth Circuit initially noted that the Michigan Supreme Court after relying on different measures of underrepresentation including absolute and comparative disparity "rejected these disparities as constitutionally insignificant." Pet. App. 18a. In the section addressing the decision of the Michigan Supreme Court under the second prong, the Sixth Circuit explained that it must review the Michigan court decision under AEDPA again stating that the Michigan Supreme Court determined that there was no significant underrepresentation:

> To prevail under AEDPA, Petitioner must demonstrate not only that the Michigan Supreme Court was incorrect, but that its application of federal law was unreasonable. The Michigan Supreme Court found that Petitioner's figures did not demonstrate that African Americans were significantly underrepresented on Kent County venire panels. After a cursory discussion of the absolute and comparative disparity tests, the supreme court concluded that "defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests." [Pet. App. 21a-22a.]

The indication therefore was that the State-court finding that there was no constitutional disparity was a decision entitled to this deference. Before stating that the Michigan Supreme "properly" reviewed the third prong of *Duren*, the Sixth Circuit had already concluded that "none of the applicable tests can appropriately measure the underrepresentation that occurred on Kent County venire panels." Pet. App. 22a.

A fair reading of the Sixth Circuit opinion indicates that it rejected the Michigan Supreme Court's determination. Yet, there was no clearly established precedent from this Court that required the Michigan Supreme Court to reach a contrary conclusion.

2. This Court did not identify any specific method of calculating disparity in Duren but appeared to apply an absolute-disparity test.

AEDPA limits federal court review of State court convictions. Under 28 U.S.C. § 2254(d)(1), the federal courts may only grant relief with respect to any State claim adjudicated on the merits if the State adjudication was contrary to or an unreasonable application of clearly established Supreme Court precedent. And the decision regarding what constitutes "clearly established" Supreme Court precedent is derived from the holdings of the Supreme Court at the time of the relevant State adjudication, rather than from obiter dictum.[16] The decision of the Court must not be just "incorrect," it must also be "objectively unreasonable."[17]

The Sixth Amendment provides the right to a jury trial in criminal proceedings. U.S. Const. amend. VI. This Court has held that the fair-cross-section requirement is fundamental to the right to a jury trial in *Taylor v. Louisiana*.[18] In doing so, this Court noted

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[16] *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

[17] *Williams*, 529 U.S. at 409.

[18] *Taylor v. Louisiana*, 419 U.S. at 531. *See also Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)(holding that the Sixth Amendment right to jury trial applies to the States through the Fourteenth Amendment).

that a person does not have a right to have the specific petit jury actually "mirror the community" and reflect the various distinctive groups.[19] Even though a defendant is not entitled to a jury of any particular composition, the panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative of the community.[20]

In *Duren*, this Court established the three-prong test for determining whether the fair-cross-section venire requirement of the Sixth Amendment is met, including the test for the second prong that the representation of the distinct group in the venires must be fair and reasonable in relation to the number of such persons in the community.[21]

The question at issue in *Duren* was whether the process in Jackson County, Missouri violated this fair-cross-section test where there was an underrepresentation of women in the venires. The Jackson County system of selecting jurors for their venires expressly distinguished between the service of men and women in two different steps in the process. At the questionnaire stage in sending out inquiries to all prospective jurors drawn from the voter registration list, there was a prominent paragraph that indicated that "[a]ny woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commission at once."[22] This same provision governed men over the age of 65. Thus,

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[19] *Taylor v. Louisiana*. 419 U.S. at 538.
[20] *Taylor v. Louisiana*. 419 U.S. at 538.
[21] *Duren*, 439 U.S. at 364.
[22] *Duren*, 439 U.S. at 361-362.

the process categorically distinguished the standards for exemption for men and women.

Likewise, after the questionnaires were returned, Jackson County then sent out its summonses, which included "special direction" providing for an automatic exemption if it was selected for women and for men over the age of 65.[23] In other words, the system again expressly treated men and women differently for purposes of their eligibility for an exemption.

The time period at issue in *Duren* covered a ten-month period in 1975 and 1976, excluding November and December. As a consequence of its categorical distinctions between women and men, although 54% of the adults of that county were women, only 26.7% of the prospective jurors summoned were women, and only 14.5% of the venires were women during the time period.[24]

The analysis of this Court determined that this disparity established a prima facie violation of the second prong. Although it did not refer to it as an "absolute disparity," this Court's analysis was apparently based on the conceptual underpinning of the absolute-disparity test, which measures the difference between the percentage in the relevant population and the percentage in the venires by subtracting one from the other:

> Such a *gross discrepancy* between the percentage of women in jury venires and

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[23] *Duren*, 439 U.S. at 362.

[24] *Duren*, 439 U.S. at 362-363.

> the percentage of women in the community requires the conclusion that women were not fairly represented in the source from which petit juries were drawn in Jackson County.[25]

In context, the meaning of "gross discrepancy" would appear to be the total difference between the two percentages. Thus, it suggests the same meaning as absolute disparity. Other federal appellate courts have noted this same point.[26] Nevertheless, this Court did not expressly specify a method of measuring the disparity.

Relying on 54% in the community and 14.5% in the venires, a calculation of the disparities at issue in *Duren* demonstrates that they were significantly higher than those at issue here. Under the absolute disparity test, the disparity in *Duren* was 39.5% (54% minus 14.5%). The comparative disparity was 73% (39.5% divided by 54%). The corresponding figures in this case were 1.28% absolute disparity and 18% comparative disparity for the six-month period during which the processes at issue were evaluated. In brief, there is nothing in the disparities that would indicate a clear basis for the conclusion that the disparities at

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[25] *Duren*, 439 U.S. at 366 (emphasis added).

[26] *U.S. v. Weaver*, 267 F.3d 231, 242 (3rd Cir. 2001)("absolute disparity . . . was the method employed in *Duren*"). *See also U.S. v. Royal*, 174 F.3d 1, 8 (1st Cir. 1999), quoting Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 Yale L.J. 1913, 1917-18 (1994)("While not explicitly endorsing any of the mathematical tests, the [*Duren*] Court seems to have considered only absolute disparity").

issue here constituted a prima facie showing of underrepresentation.

3. The federal circuits have rejected disparities similar to those at issue here under the second prong of Duren *on direct review.*

In order to determine whether a State-court decision is reasonable, this Court has examined what other courts have done in applying Supreme Court precedent to examine what is clearly established.[27] The application of *Duren* by the other federal circuits supports the conclusion that the Michigan Supreme Court finding was not unreasonable. In fact, at least seven federal circuits on direct review have reached the same conclusion in examining similar disparities.

The majority of the circuits have relied on the absolute-disparity standard in evaluating whether there is a constitutional disparity under the second prong of *Duren*, at least where the distinct group comprised a substantial portion of the community as women did in the *Duren* case.[28] By comparison, the

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[27] *Price v. Vincent*, 538 U.S. 634, 643 (2003)("[N]umerous other courts have refused to find double jeopardy violations under similar circumstances. Even if we agreed with the Court of Appeals that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise.")(footnote omitted).

[28] *U.S. v. Royal*, 174 F.3d at 10-11 (1st Cir. 1999); *U.S. v. Rioux*, 97 F.3d 648, 656 (2d Cir. 1996); *U.S. v. Butler*, 611 F.2d 1066, 1070 (5th Cir. 1980); *U.S. v. Ashley*, 54 F.3d 311, 313-314 (7th Cir. 1995); *U.S. v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996), citing *U.S. v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981); *U.S. v.*

comparative-disparity test has been evaluated in conjunction with the absolute-disparity test by several of the circuits under *Duren*, particularly where the distinct group comprised less than 10% of the community.[29] Significantly, several circuits that adopted the absolute-disparity standard, i.e., the First, Second, Eighth, and Ninth circuits, specifically rejected the comparative standard, even where examining smaller distinct groups.[30]

Sanchez-Lopez, 879 F.2d 541, 548-549 (9th Cir. 1989); and *U.S. v. Carmichael*, 560 F.3d 1270, 1280 (11th Cir. 2009).

[29] *U.S. v. Weaver*, 267 F.3d at 242-243 (3d Cir. 2001); *see also Ramseur*, 983 F.2d at 1232; *Mosley v. Dretke*, 370 F.3d 467, 479 n. 5 (5th Cir. 2004); *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996); and *U.S. v. Orange*, 447 F.3d 792, 798-799 (10th Cir. 2006).

[30] *U.S. v. Royal*, 174 F.3d at 10-11, citing *U.S. v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984)("Indeed, the *Hafen* court directly acknowledged that complete exclusion of a small distinctive group will result in only a small absolute disparity, and nevertheless chose to apply the absolute disparity test to the case before it. We accordingly employ the absolute disparity test to assess Royal's fair-cross-section claim under the second prong of the test under the Sixth Amendment and the Act.")(citation omitted; footnote omitted); *Rioux*, 97 F.3d at 656 ("While the central flaw of the absolute disparity/absolute numbers is admittedly present here, it is equally true that a small minority population alone is not enough to preclude the absolute numbers method. . . . We are satisfied that the absolute disparity approach is most appropriate for analyzing the underrepresentation claims in this case."); *Rogers*, 73 F.3d at 777, citing *Clifford*, 640 F.2d at 155, and stating that "our court has declined to adopt the comparative disparity concept as a better means of calculating underrepresentation" where the distinct group comprised less than 2% of the population); and *Sanchez-Lopez*, 879 F.2d at 547 ("In determining the underrepresentation of a particular group in jury venires, we have consistently favored an absolute disparity analysis and have rejected a comparative disparity analysis.").

The basic criticism of the absolute-disparity test is that it does not effectively measure underrepresentation when the distinct group comprises only a small percentage of the community. But the circuits – apparently without exception – have rejected a claim that there was significant constitutional disparity like those at issue here even for small distinct groups. A brief survey of decisions with similar disparities demonstrates the point (with the calculation in brackets for the courts that did not themselves perform the comparative-disparity calculation):

TABLE

Circuit	Community	Jury Pool	Absolute Disparity	Comp. Disparity
1st	4.86%	1.89%	2.97%	[61%][31]
2d	7.08%	5.0%	2.08%	[29%]
	4.24%	2.10%	2.14%	[50%][32]
3d	3.07%	1.84%	1.23%	40.01%
	0.97%	0.26%	0.71%	72.98%[33]
7th	3%	0%	3%	[100%][34]
8th	1.87%	1.29%	0.579%	30.96%[35]

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[31] *U.S. v. Royal*, 174 F.3d at 10 (African Americans).

[32] *U.S. v. Rioux*, 97 F.3d at 657-658 (African Americans and Latinos).

[33] *U.S. v. Weaver*, 267 F.3d at 241, 243 (African Americans and Latinos).

[34] *U.S. v. Ashley*, 54 F.3d at 313-314 (African Americans).

[35] *U.S. v. Rogers*, 73 F.3d at 776-777 (finding no constitutional disparity for African Americans because the panel was constrained to follow prior precedent).

TABLE (Continued)

Circuit	Community	Jury Pool	Absolute Disparity	Comp. Disparity
9th	3.87%	1.82%	2.05%	52.9%
	5.59%	2.79%	2.8%	50.0%[36]
10th	7.40%	4.78%	2.62%	35.41%
	4.21%	2.66%	1.55%	36.82%
	1.47%	0. 67%	0.80%	54.41%
	3.02%	1.36%	1.66%	54.97%[37]

In this list, all of the cases were on direct review, and all the courts rejected the claim that there was a significant constitutional disparity, either relying on the absolute-disparity test alone or also evaluating the comparative-disparity test. As a comparison to these figures, the Sixth Circuit determined that the absolute disparity during the six-month time period at issue for Smith was 1.28% (7.28% minus 6%), and found that the comparative disparity was 18% during the same time period, while the comparative disparity was 34% for the particular month in which Smith's trial was conducted. Pet. App. 21a. As this table shows, seven circuits would have rejected Smith's claim under the second prong of *Duren*.

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[36] *U.S. v. Sanchez-Lopez*, 879 F.2d at 547-549 (Latinos in Southern Division and Northern Division).

[37] *U.S. v. Orange*, 447 F.3d at 798-799 (African Americans, Native Americans, Asian Americans, and Latino Americans).

4. The Michigan Supreme Court's ruling did not conflict with clearly established Supreme Court precedent.

No law clearly established by this Court required a contrary conclusion to that reached by the Michigan Supreme Court. This is clear for several reasons.

First, there is no clearly established Supreme Court precedent that provides how to measure the underrepresentation. *Duren* did not establish a test. Moreover, *Duren* plainly does not require the application of the comparative-disparity standard for small distinct groups. The Sixth Circuit candidly acknowledged that this Court did not require this standard:

> [I]n the years since *Duren*, the [Supreme] Court has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges. [Pet. App. 18a.]

This is a concession that there is no clearly established Supreme Court precedent on this point. There was no requirement for the Michigan Supreme Court to apply the comparative-disparity test.

Second, and more importantly, there is no clearly established Supreme Court precedent that the disparities at issue here established a prima facie case of the second prong of *Duren*. The disparities at issue in *Duren* and *Taylor* were substantially higher. The fact that seven other circuits that reviewed similar

disparities have rejected the claim under the second prong – *on direct review* – demonstrates that there was no clearly established Supreme Court precedent that the Michigan Supreme Court failed to follow. This is true regardless of the test applied. See Table, pp. 32-33.

The Sixth Circuit failed to limit its review to clearly established Supreme Court precedent. As already noted above, the AEDPA standard requires not just that the decision be an unreasonable application of "federal law," but federal law "as determined by the Supreme Court" under 28 U.S.C. § 2254(d).[38]

In its application, the Sixth Circuit, however, engaged in a de novo review. It compared the Michigan Supreme Court's decision to that of other circuits, preferring the analysis of some over others both (1) in determining that the wisdom of applying the absolute disparity standard was "questionable" when applying it to a distinct group that is a small percentage of the population and (2) in determining that the comparative disparity here should give rise to a finding that there was a constitutional disparity. Pet. App. 20a. This is not the function of a federal court in habeas that is reviewing a merits decision from a State court.

In the last few years, this Court has reiterated the point that the rule at issue must be one that was

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[38] The Sixth Circuit noted that "[t]o prevail under AEDPA, Petitioner must demonstrate not only that the Michigan Supreme Court was incorrect, but that its application of federal law was unreasonable," but did not state that its application of *Supreme Court* precedent must be unreasonable. Pet. App. 21a.

specifically established by this Court and has narrowly drawn what is "clearly established" under 28 U.S.C. § 2254(d). In *Wright v. Van Patten,* for example, this Court examined the question whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.[39] The State courts had denied relief, but the Seventh Circuit determined this was a structural error under *United States v. Cronic* and granted habeas relief.[40] This Court reversed because there was no established Supreme Court precedent on this point – "No decision of this Court, however, squarely addresses the issue in this case."[41] *Wright* required that there be a "clear[] hold[ing]" from this Court on the question at issue.[42]

Similarly, in *Carey v. Musladin*, another habeas case, this Court examined whether the displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.[43] This Court initially noted that it had examined the question about possible error in the conduct of trials based on State-sponsored conduct. It then noted that the lower federal courts had diverged in their decisions in applying this precedent, some applying it to the conduct of spectators, and others not. In light of this divergence, this Court concluded that there was no clearly established Supreme Court law for the State court to apply.[44] The same point is applicable here.

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[39] *Wright v. Van Patten,* 552 U.S. 120, 121 (2008).

[40] *Wright,* 552 U.S. at 122, citing *U.S. v. Cronic,* 466 U.S. 648, (1984).

[41] *Wright,* 552 U.S. at 125.

[42] *Wright,* 552 U.S. at 125.

[43] *Carey v. Musladin,* 549 U.S. 70 (2006).

[44] *Carey,* 549 U.S. at 77.

The Sixth Circuit also predicated its decision on other critical mistakes.

The time period at issue for Smith's trial ran from April 1993 through October 1993, a six-month period. The adult population of African Americans was 7.28% for Kent County, and the extrapolations from Michael Stoline's factual analysis determined that there were 55.4 African American jurors, which is 6%, when there should have been 67.6. J.A. 112a-115a, 181a. Consequently, the absolute disparity was 1.28% for this six-month period, and the comparative disparity was 18%. The Sixth Circuit, however, singled out the particular month in which the trial was conducted – 34% – to then measure against other comparative disparities from other jurisdictions.

In contrast, this Court in *Duren* did not isolate the month in which trial was held. Rather, this Court relied on the figure 14.5% as the percentage of women on the venires even though this Court had information on the percentages of women from the weekly venires during the month at issue there (15.5%) and also identified the number of women in the panel from which Duren's jury was selected (5 women on a 53-person panel). This use of the disparity from throughout the period followed from this Court's requirement that any discrepancy be systematic, and not just "a large discrepancy" that occurred "occasionally."[45] By isolating a single month's figures to measure against other disparities that occurred over a long period in other jurisdictions, the Sixth Circuit effectively allowed one month to serve as the mark of the discrepancy at issue in this case.

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[45] *Duren*, 439 U.S. at 366.

Moreover, the Sixth Circuit then compounded its error by relying on *United States. v. Rogers*, in which the Sixth Circuit stated that a circuit found a smaller comparative disparity on which to justify a finding of a violation of *Duren*. But the ultimate holding of the Eighth Circuit in *Rogers* was to reject the claim under the Sixth Amendment because the Eighth Circuit was constrained to follow the prior holding of an earlier panel of the Eighth Circuit, which rejected the comparative-disparity method in *United States v. Clifford*.[46] The error of the Sixth Circuit was significant because it was the only case with a smaller percentage of comparative disparity to justify its conclusion.[47]

B. Evaluating the merits of this issue de novo, there was no constitutional violation based on the small disparity here.

If this Court concludes that the Michigan Supreme Court is not entitled to deference on the second prong of *Duren* under AEDPA, this Court is left to engage in a de novo review of this question.

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[46] *Rogers*, 73 F.3d at 777, citing *Clifford*, 640 F.2d at 155.

[47] Furthermore, the Sixth Circuit's reliance on *Ramseur* was misplaced since that case is distinguishable. In *Ramseur*, the absolute disparity was more than 14%, which other circuits have found to be constitutionally significant. *See*, e.g., *U.S. v. Rodriguez-Lara*, 421 F.3d 932, 943-944 (9th Cir. 2005)(absolute disparity of 14.55%); *Gibson v. Zant*, 705 F.2d 1543, 1547 (11th Cir. 1983)(absolute disparity of 20.8%); *Stephens v. Cox*, 449 F.2d 657, 659-660 (4th Cir. 1971)(absolute disparity of 15%).

1. The limitation of the fair-cross-section requirement to larger, distinct groups is consistent with the purposes underlying the Sixth Amendment requirement of an impartial jury.

In *Taylor v. Louisiana,* this Court held that the fair-cross-section requirement "is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." The Court identified three more specific purposes underlying the fair-cross-section requirement:

> (1) "to guard against the exercise of arbitrary power" by relying on the "commonsense judgment of the community;"
>
> (2) to instill "public confidence in the fairness of the criminal justice system;" and
>
> (3) "sharing in the administration of justice [as a] phase of civic responsibility."[48]

Given that the value to be protected is the right to an impartial jury under the Sixth Amendment, the paramount purpose is the first one, the shield for the community against the power of the government ("the overzealous or mistaken prosecutor").

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[48] *Taylor v. Louisiana,* 419 U.S. at 530-531. *See also Lockhart v. McCree,* 476 U.S. 162, 174-175 (1986)(identifying the three purposes of the fair-cross-section requirement).

In rejecting the extension of the fair-cross-section requirement to peremptory challenges for the petit jury, this Court in *Holland v. Illinois* further elaborated on how the fair-cross-section venire requirement ensures an impartial jury.[49] The core of the protection does not ensure that the petit jury itself is "representative" but rather that the pool from which it is selected is not devised by the State to be "ill disposed towards one or all classes of defendants[.]"[50] *The key is the impartiality of the jury.* This analysis confirms the point identified in *Taylor v. Louisiana* that the jury will only serve the function of shielding against "arbitrary power" where the jury venire is not just comprised of "special segments" and where "*large*, distinctive groups" are not excluded.[51]

The recognition in *Taylor v. Louisiana* that excluding *large* distinctive groups from the jury pool may frustrate the Sixth Amendment suggests by contrast that the failure to include small distinctive groups in the jury pool would not present the same danger. This is so because a small distinctive group would not significantly affect the jurors that actually sit on the petit jury.

The facts of this case bear this out. The expert, Michael Stoline, explained that for the four-week period in the month in which Smith's trial occurred, one would have expected 11.5 African American prospective jurors out of the total of 158 jurors for that time period (11.5 is 7.28% of 158). Based on the tracts from the census, he projected that there were likely

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[49] *Holland v. Illinois*, 493 U.S. 474, 480 (1990).

[50] *Holland v. Illinois*, 493 U.S. at 480-481.

[51] *Taylor v. Louisiana*, 419 U.S. at 530 (emphasis added).

only 7.5 African American jurors, i.e., that the venires were four African American jurors short for that month. J.A. 181a. Accepting the State trial court's estimate for the particular panel in Smith's trial, there were three African Americans among the panel of 60 prospective jurors, J.A. 7a, which is 5%. Thus, relying on the 7.28%, there should have been one or perhaps two more African Americans for this particular panel.[52]

Given the size of this panel – 60 prospective jurors – the random likelihood that any one juror would sit in the petit jury was only one in five or 20%. Therefore, the failure to include the one or two more African American prospective jurors likely had no effect on the specific petit jury selected. In this way, the paramount purpose underlying the fair-cross-section requirement was not violated. The petit jury would likely have been the same regardless of the small disparity.

Applying the fair-cross-section venire test to small absolute disparities does not further the end of ensuring impartial juries. This is because small disparities – like the ones here – do not indicate that the venires were comprised of only "special segments,"[53] or only of jurors "disproportionately ill

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[52] Four African American jurors is 6.67% and five African American jurors is 8.3%. *Cf. U.S. v. Jenkins*, 496 F.2d 57, 65 (2d Cir. 1974)("a 6% to 3% disparity between the census figures and the voter registration figures for the community would add to an average array of 50 to 60 veniremen only one (1) additional [African American], which [the court] found not to be substantial enough to deprive appellants of their constitutional or statutory rights. We agree.").

[53] *Taylor v. Louisiana*, 419 U.S. at 530.

disposed towards one or all classes."[54] The venires here were not contrived – they were not rigged. The petit jury was impartial.

2. As noted by several of the other circuits, the comparative-disparity test is unworkable for such small disparities.

This point also underscores the limited value of the comparative-disparity test. The circuits that specifically rejected or criticized this approach generally did so because of the fact that it exaggerates or distorts the significance of disparities for small groups.[55] The smaller the distinct group, the larger the percentage a discrepancy may create even where it has little if any likelihood of affecting the ultimate composition of the petit jury:

> Carried to its logical conclusion appellants' argument would require that if the adult [member of a distinct group] in a community constituted 1% of the population, but only 1/4 of 1% were registered voters, the 4 to 1 disparity would deny a [person] a fair trial.[56]

At the farthest extreme, for a distinct group of only a single member, the failure to include that member would be a 100% comparative disparity, but would not

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[54] *Holland v. Illinois*, 493 U.S. at 480.

[55] *See*, e.g., *U.S. v. Hafen*, 726 F.2d at 24; *U.S. v. Jenkins*, 496 F.2d at 65; and *U.S. v. Sanchez-Lopez*, 879 F.2d at 548.

[56] *U.S. v. Jenkins*, 496 F.2d at 65-66.

have any bearing on the real cross-section of the community at issue.[57]

If this Court does not discount the value of the comparative-disparity test for evaluating small disparities such as these, the only evident way to avoid a fair-cross-section challenge based on small discrepancies would be to create a self-conscious process based on race and ethnicity to ensure that the venires match the relevant population percentages. The use of the comparative-disparity test as here would effectively require a quota system to avert the prima-facie challenge. And the only way to ensure that the venires mirror the percentages in the population would be to identify the race and ethnicity of every prospective juror. Kent County does not obtain this information. In fact, the report generated by the expert Michael Stoline had to rely on projections based on the racial identity of the census tracts.

The circuits that have promoted the comparative-disparity analysis note that without this analysis, there may be a complete exclusion of a distinct group that comprises less than 10% of the population. The Sixth Circuit made that point here, relying on *Foster v. Sparks*:

> [A]n intractable use of the absolute measure may, in certain circumstances also produce distorted results. For example, if a district with 10% non-white population has 0.5% non-whites in the wheel, the 9.5% disparity may not evoke disapproval under an absolute measure

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[57] *See U.S. v. Hafen*, 726 F.2d at 24.

> but may require it under a comparative measure. [Pet. App. 20a.][58]

One of the considerations that might underlie this analysis is not the failure to include all distinct groups in the venire from the community, but rather the suspicion that this exclusion is intentional. Yet these considerations are addressed by an intentional exclusion claim brought under the Equal Protection Clause.

The Sixth Circuit relied on *United States v. Jackman*, which evidenced this same concern.[59] In *Jackman,* the Second Circuit had concluded that the limited magnitude of the disparities created a close question but that the fact that they resulted from less than "benign" factors in the selection process led the Second Circuit to conclude that there was a prima facie violation of the second prong of *Duren.*[60] Yet, such analysis conflated the second and third prongs of *Duren* and manifested the Second Circuit's concern that the government had knowingly failed to correct a constitutional deficiency in its selection process.[61] The intentional exclusion of prospective jurors who are members of distinct groups, however, is governed by the Equal Protection Clause, not the Sixth

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[58] *Foster v. Sparks*, 506 F.2d 805 (5th Cir. 1975).

[59] *U.S. v. Jackman*, 46 F.3d 1240 (2d Cir. 1995).

[60] *U.S. v. Jackman*, 46 F.3d at 1247.

[61] *U.S. v. Jackman*, 46 F.3d at 1247 ("The underrepresentation of Hartford and New Britain residents continued for more than a year after disclosure of constitutional infirmities in the selection process. The procedure adopted in the aftermath of *Osorio* was not designed to assure fair representation of either the populations of those cities or the significant minority populations living there").

Amendment. The paramount purpose of the fair-cross-section requirement of the Sixth Amendment is ultimately to ensure an impartial jury.

Even if this Court concludes that the comparative-disparity test is appropriate in some circumstances, the small disparities at issue here do not establish a prima facie case of unfair and unreasonable representation. As already noted, the Sixth Amendment establishes the right to an impartial jury trial, which is protected by ensuring that the venires are not comprised of only "special segments" or of prospective jurors "ill-disposed" toward the defendant.[62] There is no basis on which to believe that a 1.28% absolute disparity or an 18% comparative disparity is sufficient to render the venires here unrepresentative or contrived. This is the reason that apparently all of the circuits have rejected similar disparities – whether measured by absolute disparity or comparative disparity – as establishing a prima facie case. See Table, pp. 32-33. The venires here were adequately representative of the community. Smith's right to an impartial jury under the Sixth Amendment was not violated.

3. This Court should adopt a general threshold requirement of a 10% absolute disparity.

In order to provide guidance to the bench and bar on these issues, this Court should expressly adopt the absolute-disparity standard for measuring fair and reasonable representation, requiring proof that the

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[62] *Taylor v. Louisiana*, 419 U.S. at 530 ("special segments"); *Holland v. Illinois*, 493 U.S. at 480-481 ("ill disposed").

absolute disparity exceeds 10% before there has been a prima facie showing of a violation of the second prong of *Duren*.

This standard corresponds to this Court's acknowledgement in *Taylor v. Louisiana* that it is "large, distinctive groups" that must not be excluded from the jury pools.[63] The primary point underlying the right to a fair-cross section is that the jury lists cannot ultimately be contrived so that the venires are "more likely to yield petit juries" who are ill-disposed to one or all defendants.[64] Because the core value is the Sixth Amendment right to an impartial jury, a legitimate – indeed a controlling – consideration under the Sixth Amendment is that small absolute disparities will not significantly affect the ultimate petit jury composition.

There does not appear to be a single case from the federal courts under the Sixth Amendment in which a court found that an absolute disparity of less than 10% was constitutionally significant.[65] Therefore, this rule would reflect the actual practice of the federal courts of appeals.

In fact, several of the circuits have relied on the 10% standard.[66] Such a rule would be consistent with

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[63] *Taylor v. Louisiana*, 419 U.S. at 530.

[64] *Holland v. Illinois*, 493 U.S. at 480-481.

[65] *See* 25 J. Moore et. al., Moore's Federal Practice, Criminal Procedure § 624.03[2][c] (3d ed. 2009) ("Although there are no precise mathematical standards, in practice, if the absolute disparity is less than about 12%, the courts will find that there is not statistical underrepresentation of the group.").

[66] *See U.S. v. Butler*, 611 F.2d at 1070 (5th Cir.)(stating that "None of the disparities urged by the appellants are as great as

the need to draw a "clear line" in protecting the right to an impartial jury under the Sixth Amendment.[67] The courts that have relied on this standard have done so based on *Swain v. Alabama*, which evaluated a prima facie case of intentional exclusion of prospective jurors under the Equal Protection Clause.[68] For

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the 10% disparity found not to present a case of purposeful discrimination in *Swain*" in rejecting absolute disparities of 9.14%, 8.69%, and 5.71%), *U.S. v. Butler (On Rehearing)*, 615 F.2d 685, 686 (1980)("We did not wish to imply that the absolute disparity method is the sole means of establishing unlawful jury discrimination"); *U.S. v. Ashley*, 54 F.3d at 314 (7th Cir.)("[A] discrepancy of less than ten percent alone is not enough to demonstrate unfair or unreasonable representation"); *see also U.S. v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990)(describing as "de minimis" the absolute disparity of 8% for a situation in which African Americans were 20% of the population but 12% of the venire); and *U.S. v. Carmichael*, 560 F.3d at 1280-1281 (11th Cir. 2009)(following Eleventh Circuit precedent that an absolute disparity of ten percent or less fails to satisfy *Duren*'s second prong).

[67] *See Ballew v. Georgia*, 435 U.S. 223, 239 (1978)(the Sixth Amendment requires at least six jurors).

[68] *See*, e.g., *U.S. v. McAnderson*, 914 F.2d at 941 ("As the Supreme Court has noted, discrepancies of less than ten percent, standing alone, cannot support a claim of underrepresentation."), citing *Swain v. Alabama*, 380 U.S. 202 (1965), overruled in part on other grounds, *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Swain*, this Court stated that "[w]e cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%." Later, this Court in *Alexander v. Louisiana* noted, however, that it has "never announced mathematical standards for the demonstration of 'systematic' exclusion." *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972). *See also Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986)(finding intentional discrimination of African Americans for their total exclusion where African Americans comprised 4.7% of the population without evaluating the magnitude of the disparity).

distinct groups that comprise a small percentage of the population, the equal protection safeguards would remain to protect against intentional exclusion from the jury selection process under *Castaneda v. Partida.*[69]

Of course, this Court need not adopt this standard in order for the State of Michigan to prevail. The suggestion is offered to provide further clarity to the law and to give the lower courts and the State courts an identifiable standard to apply. Here, the Michigan Supreme Court applied two standards, the absolute-disparity test and the comparative-disparity test, in evaluating the claim. Pet. App. 146a. The concurrence also evaluated the standard-deviation test. Pet. App. 163a-165a. Rather than applying three separate, incompatible tests, the establishing of the absolute-disparity test would provide a sure norm for the lower courts to follow.

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[69] *Castaneda*, 430 U.S. at 494 (establishing a three-part test for a prima facie case of jury discrimination amounting to a denial of equal protection: [1] a distinct group; [2] that is substantially underrepresented; and [3] a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing).

II. The Michigan Supreme Court's decision that there was no systematic exclusion under the third prong of Duren was not objectively unreasonable.

Under the third prong of *Duren*, Smith claimed that the small disparities at issue here were the result of Kent County's systematic exclusion of African American jurors from its venires. The Sixth Circuit agreed in two areas, concluding that the Michigan Supreme Court was objectively unreasonable, because (1) the allowance for excuses based on hardship and (2) the "siphoning" of prospective jurors to the local courts before serving in the county courts resulted in systematic exclusion of African American jurors. Although the Sixth Circuit determined that the State of Michigan had rebutted the claim on hardship excusals because there was a significant State interest there, the Sixth Circuit was wrong on both counts in concluding that the Michigan Supreme Court was objectively unreasonable in rejecting the prima facie case in the first instance.

Regarding the hardship excusals, there is no clearly established Supreme Court precedent that required the conclusion that the allowance of excusals for hardship would constitute systematic exclusion if it resulted in significant disparities. *Duren* and *Taylor v. Louisiana* examined processes in which Missouri and Louisiana categorically treated distinct groups differently. That did not occur here. Kent County did not discriminate between distinct groups. Rather, the processes it applied were facially neutral.

Regarding the assignment of prospective jurors to district court before circuit, again there is no clearly

established precedent from this Court to indicate that such facially neutral processes are improper. Moreover, the Sixth Circuit improperly relied on anecdotal information to rebut the Michigan Supreme Court's factual finding that Smith had failed to meet his burden. Furthermore, in finding that the State had rebutted the showing of a violation on the hardship excusals, the Sixth Circuit found that the underrepresentation was due solely to the assignment process. Yet, there was no record support for the finding that this assignment process caused sufficient underrepresentation by itself to cause a violation of the second prong of *Duren*. That is dispositive because the third prong of *Duren* requires a showing that the "underrepresentation is due to the systematic exclusion" in the jury-selection process.[70]

A. This Court has not clearly established what types of practices constitute systematic exclusion other than the categorical distinctions applied in *Duren* and *Taylor v. Louisiana*.

In *Duren*, this Court established that the defendant must show that the underrepresentation was a result of systematic exclusion. This Court noted that the "large discrepancy" cannot be merely "occasional" after evaluating the duration and persistence of the underrepresentation at issue there.[71] The exclusion must be "inherent" in the processes used.[72]

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[70] *Duren*, 439 U.S. at 364.
[71] *Duren*, 439 U.S. at 366.
[72] *Duren*, 439 U.S. at 366.

The two cases that examined this concept of systematic exclusion – *Duren* and *Taylor* – evaluated processes in which the State categorically treated distinct groups differently. In *Duren*, Missouri provided an automatic exemption to all women and only men older than 65 years old for all who requested the exemption. And it provided the same exemption if requested in its summonses – Missouri decided that the women who did not respond were "presumed to have claimed [an] exemption[.]"[73] Likewise, in *Taylor*, Louisiana automatically excluded women from service unless a woman had filed a declaration with the clerk indicating her desire to serve.[74]

In its application of the third prong of *Duren*, this Court noted that the defendant had shown that the exclusion of women was due to "the system by which juries were selected," specifically the underrepresentation was "due to the operation of Missouri's exemption criteria."[75] There were no such categorical distinctions at issue here.

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[73] *Duren*, 439 U.S. at 367.
[74] *Taylor v. Louisiana*, 419 U.S. at 523.
[75] *Duren*, 439 U.S. at 367.

B. The Michigan Supreme Court did not unreasonably apply clearly established law when it concluded jury hardship excuses did not demonstrate systematic exclusion under Duren's third prong.

1. The hardship excusals did not constitute a systematic exclusion.

In rejecting the Michigan Supreme Court's analysis and concluding that it had unreasonably applied clearly established Supreme Court precedent regarding the excuses, the Sixth Circuit erred by imposing a new federal requirement, where none existed previously, in determining that Smith had established the prima facie case of systematic exclusion based on the hardship excusals. In reaching this conclusion, the Sixth Circuit ignored the AEDPA standards and contrived a new constitutional requirement. The excusals are a reasonable measure and not expressly limited to any group. And without the excusals, many jurors – whether members of a distinct group or not – would face a Hobson's choice: either appear for jury duty in the face of neglecting their children or losing their jobs or disregard their jury service and ultimately face a hearing for contempt for failing to appear.

Smith claimed that Kent County systematically excluded prospective African American jurors because it allowed for exemptions based on personal reasons. The Circuit Court Administrator, Kim Foster, testified that the county provided for excuses based on considerations of child-care, transportation, and conflicts with work. J.A. 21a. Related to these exemptions, Smith provided testimony at the

evidentiary hearing to show that there were significantly higher percentages of single-parent households in the African American community (64% to 19%), higher poverty rate in the African-American community (31.5% to 6.7%), and that there were significantly more African American households without vehicles (30% to 6%). J.A. 80a, 81a-82a. There was no testimony about whether African American jurors selected these excuses in greater numbers than others because this information was not recorded by the county.

The Michigan Supreme Court rejected this claim because the "influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." Pet. App. 147a. Also as a factual matter, the concurrence (joined by the majority on this point) noted that there was no concrete evidence that these exemptions in fact resulted in "fewer black prospective jurors" because the evidence was only supported by "generalized" testimony. Pet. App. 171a.

In rejecting these conclusions as unreasonable, the Sixth Circuit determined that the Sixth Amendment is "concerned with social and economic factors":

> Contrary to the conclusion reached by the Michigan Supreme Court, the Sixth Amendment is concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately

> called to or excused from service on a venire panel. [Pet. App. 27a-28a.]

The Sixth Circuit then determined that because the social and economic factors "disproportionately" affected African Americans, they are inherent in the particular jury selection used. Pet. App. 29a.

But there is no clearly established Supreme Court precedent that supports this conclusion. The processes at issue in *Duren* categorically treated women differently from men in the jury selection process. There was nothing comparable here in the Kent County system. The allowance by Kent County for an excuse based on hardship was uniformly available to all prospective jurors without regard to race, ethnicity, or sex. There was no targeting of distinct groups – Kent County does not determine which prospective jurors will seek an excuse from service.

The fallacy underlying the Sixth Circuit's analysis is its conclusion that a neutral process that disproportionately affects distinct groups because of social or economic factors is *inherent* in the process and is exclusionary. There is no Sixth Amendment case law from this Court to support that conclusion. This is because systematic exclusion inheres in the process when the process itself distinguishes between the distinct groups. That was the point in *Duren*.

In contrast, a reasonable standard that affects distinct groups differently based on the independent actions or decisions of the members of the group is external to the process. As confirmation of this point, the circuits have rejected on direct review the claim of

systematic exclusion regarding disparities that arise from the use of voter registration lists.[76] As noted by the circuits, the United States relies on voter registration lists for its "presumptive" statutory list of prospective jurors under 18 U.S.C. § 1863(b).[77]

In rejecting claims of systematic exclusion under the third prong of *Duren* based on disparities from the use of voter registration lists, the analysis of some of the federal appellate courts have been based on the fact that the independent decisions of prospective jurors do not represent systematic exclusion under *Duren*'s third prong. For example, in *United States v. Orange*, the defendant claimed that there were disparities that arose from (1) the failure to update mailing addresses; (2) the failure to follow up on undelivered questionnaires; and (3) from the use of voter registration where minorities were less likely to vote. In rejecting that any disparities were systematic, the Tenth Circuit noted that "[n]one of these purported

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[76] *See U.S. v. Biaggi*, 909 F.2d 662, 677-678 (2d Cir. 1990); *U.S. v. Cecil*, 836 F.2d 1431, 1446-1455 (4th Cir. 1988)(en banc); *U.S. v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008); *U.S. v. Smallwood*, 188 F.3d 905, 914-915 (7th Cir. 1999); *U.S. v. Morin*, 338 F.3d 838, 843-844 (8th Cir. 2003); *U.S. v. Orange*, 447 F.3d at 800, citing *U.S. v. Test*, 550 F.2d 577, 586-587 (10th Cir. 1976)(en banc). *Cf. U.S. v. Weaver*, 267 F.3d at 244-245 ("we note that if the use of voter registration lists over time did have the effect of sizeably underrepresenting a particular class or group on the jury venire, then under some circumstances, this could constitute a violation of a defendant's fair-cross-section rights under the Sixth Amendment.")(internal quotes omitted; citation omitted); and *U.S. v. Lewis*, 10 F.3d 1086, 1090 (4th Cir. 1993)("the disparity between the proportion of eligible whites selected for master jury wheel and proportion of eligible minority persons selected must not exceed twenty percent")(internal quotes omitted; citation omitted).

[77] *See*, e.g., *U.S. v. Orange*, 447 F.3d at 800.

causes for under-representation constitute systematic exclusion. Discrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*."[78] The same is true for the failure to follow up on questionnaires that were not returned by the prospective juror.[79] The Michigan Supreme Court's conclusion that Smith had failed to establish a prima facie case based on hardship excuses was not objectively unreasonable.

Moreover, if such a neutral system may give rise to systematic exclusion based on the economic or social condition of a distinct group, then any neutral means devised for selecting jurors must also be supplemented by a self-conscious system to ensure that there has been no underrepresentation. Kent County does not keep figures on the race and ethnicity of its prospective jurors. If the Sixth Circuit is correct, then Kent County would be obliged to do so to ensure that the venires mirror the latest census figures.

Even if this Court concludes that a system of juror selection that is neutral – like the granting of excuses – is inherent in the process for the purposes of *Duren*, there is no clearly established Supreme Court precedent that provides this resolution. *Duren* and *Taylor* do not provide sufficient specificity to the State courts to guide them on this point, in the same way as this Court explained in *Wright* and *Musladin*.

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[78] *U.S. v. Orange*, 447 F.3d at 800.

[79] *See*, e.g., *U.S. v. Rioux*, 97 F.3d at 658 ("The inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to outside forces, such as demographic changes").

Finally, as an independent basis of error, the Sixth Circuit never addressed the analysis from the Michigan Supreme Court's concurrence – adopted by the majority – that there was no specific evidence to support the claim of systematic exclusion based on the granting of excusals. Pet. App. 23a-35a. There was no direct evidence that African Americans sought excusals at a higher rate.

2. As the Sixth Circuit correctly found, the State has a substantial interest in allowing excusals based on hardship.

The Sixth Circuit ultimately found that the prima facie violation for the Kent County provision for hardships had been rebutted by the State because of the "significant interest" in avoiding these burdens on jurors. Pet. App. 34a-35a. Although the State contests the conclusion that any disparities arising from the hardships were inherent in the process, the Sixth Circuit was right that allowing excuses for hardship serves a significant State interest.

In *Taylor v. Louisiana,* this Court noted that "States are free to grant exemptions from jury service to individuals in case of special hardship[.]"[80] In *Duren,* this Court reiterated that reasonable exemptions based on "special hardship" or "community needs" would not likely pose a threat to leaving the remaining pool of prospective jurors unrepresentative.[81] The exemptions at issue here fit squarely within the definition of "special hardship."

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[80] *Taylor v. Louisiana,* 419 U.S. at 534.

[81] *Duren,* 439 U.S. at 370.

C. The Michigan Supreme Court did not unreasonably apply clearly established Supreme Court law when it concluded that Smith failed to carry his burden of establishing that the "siphoning" of jurors resulted in systematic exclusion under *Duren's* third prong.

In the same way as the hardship excuses, the selection of the jurors for the local courts first and the county courts afterward did not categorize distinct groups differently. The processes were neutral.[82] There was nothing inherent in the system as defined by *Duren* that was systematically exclusionary. The third prong of *Duren* is more than just persistent statistical disparity; otherwise the second prong would then supplant the third prong of *Duren*.[83] This Court's analysis in *Duren* requires an additional showing, that is, that the disparities were inherent in the selection process as they were in that case.

Smith claimed that the Kent County process of selecting prospective jurors for the local courts first and then the county courts "siphoned" African American jurors from the venires for the county. At the evidentiary hearing, Kim Foster explained that

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[82] *See*, e.g., *U.S. v. Bullock*, 550 F.3d 247, 252 (2d Cir. 2008)("The motor vehicle roll was included specifically 'to make sure that [the] jury pool [wa]s balanced.' That the district court failed in its attempt to achieve such balance does not detract from the court's demonstrably race-neutral approach to juror selection.").

[83] *See Paredes v. Quarterman*, 574 F.3d 281, 290 (5th Cir. 2009)("If any discrepancy sufficient to satisfy the second prong would also satisfy the third, the third inquiry would be superfluous.").

this process was discontinued in October 1993. J.A. 22a.

The Michigan Supreme Court found that Smith had failed to carry his burden of showing systemic underrepresentation:

> The record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool. Defendant has simply failed to carry his burden of proof in this regard. [Pet. App. 147a.]

This factual determination was underscored by the concurring opinion in the Michigan Supreme Court, which noted that after Kent County discontinued this practice of allowing prospective jurors to be first selected by local courts, the change in the number of African Americans available in State circuit court was "small." Pet. App. 169a n. 15.

On this point, the Michigan Supreme Court was right that Smith had not provided an explanation about why the selection of the local district courts first – when done for all the districts in the county – would result in fewer African Americans in greater proportion to other prospective jurors when all of the districts were subject to this assignment process. J.A. 21a.[84] What the Sixth Circuit ignored was that all district courts obtained jurors first. There was no

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[84] Foster testified that "[a]ll the [jury] panels went out to the District Courts, the Circuit Court panel list for the year was selected by the time I arrived[.]" J.A. 21a.

showing that the percentage of residents from the City of Grand Rapids assigned to district courts was greater than the percentage of the overwhelmingly non-African American residents from other areas of the county. There was thus no specific evidence that the practice of assigning jurors first to district court had any effect on the percentage of African-American jurors in the circuit court for Kent County.

In rejecting these factual findings, the Sixth Circuit effectively usurped the role of the State judiciary. Under the AEDPA, 28 U.S.C. § 2254(e), the factual findings of the State courts are presumed to be correct. On this point, the Sixth Circuit relied on testimony from two witnesses from the State evidentiary hearing that did not include any concrete data regarding the numerical effect of this process. The testimony was merely anecdotal.[85]

In the absence of direct evidence to rebut the factual conclusion of the Michigan courts, the Sixth Circuit was foreclosed under 28 U.S.C. § 2254(e) from making this finding. The Sixth Circuit's rejection of the Michigan Supreme Court's factual conclusions and the substitution of its own factual inferences regarding the evidence is at odds with the statutory presumption of correctness accorded State courts' factual findings.

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[85] The Sixth Circuit quoted Richard Hillary, director of the Defender's Office, who said that he "routinely observed few" African Americans on Kent County venire panels and that the Jury Minority Representation Committee had "studied" the matter and found that it was caused by losing minorities to the local courts; and Kim Foster, the Kent County Court Administrator, who said that the system was revised based on "the belief" that the local courts had "swallowed up" the African American jurors. Pet. App. 29a-30a.

By not granting the Michigan Supreme Court finding the presumption of correctness under AEDPA, the Sixth Circuit failed to perform the proper review in habeas.

Nevertheless, the Sixth Circuit concluded that because 85% of the African American population resided in Grand Rapids, it then found that this assignment process to the local Grand Rapid courts "essentially omits" the Grand Rapids jurors. Pet. App. 33a. But this conclusion is not supported by the record.

At best, Smith showed a small correlation. At the evidentiary hearing, Smith provided testimony that there was an 18% comparative disparity from April 1993 through October 1993 (when the juror assignment process was in place) and then a 15% comparative disparity from October 1993 through October 1994 (after it was discontinued). J.A. 112a-115a, 181a. In actual numbers, the strongest case that Smith can make is that this claim of "siphoning" affected the jury venires by a 3% comparative disparity. This would mean that there were two fewer African American jurors for the entire six-month period of time from April 1993 through October 1993 where there were 929 prospective jurors in total.[86] But the Sixth Circuit determined that there was no

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[86] This is calculated by computing a 15% comparative disparity for April 1993 through October 1993 that presumably would have occurred absent the "siphoning." Stoline determined the 18% by dividing the disparity (12.2) by the expected African American jurors (67.6), where there were a projected 55.4 African American jurors. J.A. 181a. Thus, there would be a 15% for this same time period if a disparity of 10.1 (two fewer African American jurors) was divided by the expected African American jurors (67.6), creating a new projected number of 57.4 African American jurors.

unconstitutional underrepresentation that resulted from the excusals based on its finding of a significant State interest. Thus, the Sixth Circuit determination of underrepresentation resulted solely from the juror assignment. Accepting the correlation, the comparative disparity that resulted from the assignment process was only 3%. As a consequence, Smith failed to show that any significant underrepresentation was "due to the operation" of Kent County's assignment system as required by the third prong of *Duren*.[87] This is not a constitutionally significant number. There is no basis on which to conclude that Smith was deprived of a fair trial based on an impartial jury based on the assignment system. This Court should reverse.

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[87] *Duren*, 439 U.S. at 367.

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

Michael A. Cox
Michigan Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Timothy K. McMorrow
Special Assistant Attorney General
Appellate Chief
Kent County Prosecutor's Office

Attorneys for Petitioner

Dated: November 2009

RESPONDENT'S BRIEF

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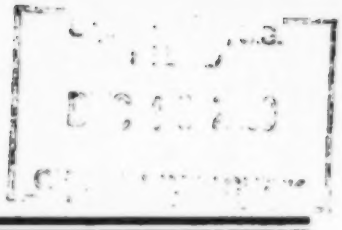

No. 08-1402

IN THE

Supreme Court of the United States

MARY BERGHUIS, WARDEN,

Petitioner,

v.

DIAPOLIS SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

JAMES STERLING LAWRENCE
828 W. Eleven Mile Road
Royal Oak, Michigan 48067
(248) 399-6930

Counsel for Respondent

December 18, 2009

QUESTION PRESENTED

Whether the United States Court of Appeals erred in finding systematic underrepresentation under *Duren v. Missouri*, 439 U.S. 357 (1979), and that the Michigan Supreme Court ruling finding no systematic underrepresentation was unreasonable.

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STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review the Sixth Circuit ruling under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has correctly stated these.

STATEMENT OF THE CASE

Respondent Diapolis Smith was convicted at a jury trial in the Kent County, Michigan Circuit Court of second degree murder and felony firearm, and received sentences of life in prison (parolable) and 2 years. The Michigan Court of Appeals reversed for a new trial. The Michigan Supreme Court reinstated the conviction. The United States District Court denied Habeas Corpus relief. The Sixth Circuit Court of Appeals granted Habeas Corpus relief by a 3-0 vote. The state sought rehearing en banc which was denied unanimously.

The issue on which Respondent won below is a persistent pattern of underrepresentation of minorities on jury arrays, leading to an underrepresentation of African-Americans of 34.7% in Respondent's jury month, 18.1% in his jury year,

and an all-white jury for Respondent, in a county where the population is 8.1% African-American, and the jury-eligible population is 7.8%. The persistent pattern shown in 15 out of 17 months as it related to this case was held to be a violation of the Sixth Amendment right to a jury comprised of a fair cross-section of the community, under the rules established by this Court in *Duren v. Missouri*, 439 U.S. 357 (1979).

1. **The Crime and the Trial.**

Respondent Diapolis Smith was tried on charges of open murder, felony firearm, assault with intent to murder, and felony firearm in the Kent County, Michigan Circuit Court before the Hon. Michael Smolenski beginning September 13, 1993.

The charges arose out of a shooting of Christopher Rumbley at So So's Bar in Grand Rapids late in the evening on November 6, 1991. The patrons of the bar were all African-Americans. The bar was crowded with 200 to 300 people. Thirty-seven witnesses from the bar, including Respondent Smith, testified at the trial. Of those, two testified the shooter was Smith, five testified it was not Smith, and the remainder made no identifications of the shooter.

There were very substantial reasons for a jury to find Respondent not guilty, but this jury, which was all-white, rejected those.[1]

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[1] Katherine Brown testified she saw Respondent shoot while Respondent was holding the victim's collar. (T 219). She testified she didn't identify Respondent at the lineup, though she recognized him, because she "didn't understand the question" being posed to her by police at the lineup. (T 226). At the preliminary examination she testified Respondent was at the bar, but did not see him with a gun. (T 234; PT I, 12). At

2. The Jury Composition and Evidentiary Hearing.

A panel of 14 venirepersons was seated. (T 7; JA 430). During the jury selection, 7 jurors were dismissed for cause, 4 were dismissed by prosecutor peremptory challenges, and 12 were dismissed by defense peremptory challenges. By the time of the final seating of 14 jurors, 23 had been excused, making a total of 37 people who had gotten into the jury box. Every single one of these 37 people was white. (T 145, 148; JA 472-473).

Defense counsel made a motion, noting that there were no blacks on the jury, and requested more

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trial, she testified she saw Respondent holding a gun and shooting the deceased. (T 216, 266).

Anthony Hardin testified he saw Respondent shoot the deceased while standing next to him (T 1313, 1346-1347), but admitted he told police the shooter was shorter than Rumbley, (T 1344-1345). Respondent Smith was five inches taller than Rumbley. (T 399, 693).

Medical examiner Dr. Cohle testified the shot was from at least 4 feet away, and was inconsistent with a person firing while grabbing the deceased's collar or standing next to him. (T 694-695, 702, 711; JA 480-484). Laura Dean testified the shooter, whom she was unable to identify, was standing 30 to 35 feet away from Rumbley. (T 373). Jimmy Mack testified when the shot was fired he heard and felt the bullet whiz by his ear. (T 805).

The boyfriend of Katherine Brown's sister Dorothy Brown was Rod Fee, who strongly resembles Petitioner Smith. (T 206, 516, 1056, 1090). Fee testified he took a cab to So-So's bar that night, but never went in. (T 1067, 1070). Dorothy Brown testified Fee was not at the bar. (T 1057-1058). Sandra Buchanan testified Fee was the man she saw arguing with the deceased before the shooting. (T 516). Eva Price testified that Dorothy Brown introduced her to Mr. Fee in the bar that night as being Dorothy's man. (T 623-624, 630).

peremptory challenges, to get at least 1 black person on the jury. (T 148; JA 472). He noted a court rule provided additional peremptories and may be granted "for good cause" and noted that there were "a hundred or so" people called to jury service, with "either two or three" of those people being black. (T 148; JA 472). The judge indicated that he thought 60 prospective jurors were called, and 3 were black. (T 150; JA 474).

At the evidentiary hearing, Kent County Circuit Court Administrator Kim Foster testified that the original list of 350,000 names of prospective jurors was from the Secretary of State database of driver's licenses and ID cards (hereafter the Secretary of State list), and a key number was used to select every "nth" name, to reduce the number of names to 50,000 (the reduced Secretary of State list). (EHT I, 14-16; JA 615). Notices to prospective jurors were sent out by mail. Of those, 5% were returned by the post office as undeliverable. An additional 15 to 20% were not responded to. (EHT I, 17; JA 616). Of the no-response letters, a second letter is sent out, which gets about a 50% response rate. (EHT I, 18-19; JA 616).

For those who do not respond, an order to show cause is mailed out. However, no action is taken against those who fail to respond to the show cause order. (EHT I, 19-20; JA 616). It is unknown how many served with show cause orders appeared or failed to appear. (EHT I, 48; JA 622). Kent County law enforcement would not serve bench warrants, if issued. (EHT I, 48; JA 622). After this process, the responding potential jurors are placed on the qualified jurors list. (EHT I, 20; JA 616).

Mr. Foster explained that if a person on the questionnaire claims one of the statutory exemptions,

that person is not placed on the qualified jurors list. As for verification of the exemption, "We do some verification, depending on our resources." After checking birthdate and mental disability lists, beyond that, "we generally take the individual's word." (EHT I, 21; JA 617).

Neither list contained the race of the individual being kept or being excused. (EHT I, 22; JA 617).

From the qualified jurors list a smaller group is selected randomly, to a list called the "second list." (EHT I, 22-23; JA 617).

If a notice to appear to a juror is not delivered, the court takes no action. (EHT I, 25; JA 618). If a person who gets a notice to appear fails to show up, they make an attempt to contact the person by telephone. If the person does not have a telephone, they "generally" send out a letter, with no action taken if no response. (EHT I, 26-27; JA 618).

Beginning October 1, 1993, the court began selecting Circuit Court jurors first, then District Court jurors. However, before that date, District Court jurors were selected first, and only then were Circuit Court jurors selected. (EHT I, 27-31; JA 618-619).

Petitioner's jury selection began September 13, 1993. The juror list would have been selected in May and June of 1992, in other words, approximately 15-16 months before Petitioner Smith's trial. (EHT I, 28; JA 618).

Mr. Foster testified (EHT I, 30; JA 619):

> "Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just – it

represented certain portions of the county."

Mr. Foster observed "[t]he visible minority jurors appeared low." (EHT I, 38; JA 620).

Since 1993, the underrepresentation situation has improved. (EHT I, 53). People would sometimes seek to be excused from jury service for nonstatutory reasons, such as being unable to get a ride or a babysitter. If they had a request, it would be decided on a case by case basis by a court administrator. (EHT I, 28-29; JA 618-619).

Mr. Foster also testified that there was no effort made to compensate for certain possible problems. No steps were taken to correct any underrepresentation of minorities to compensate for those excluded because of under sentence for felony rule; No steps to add minorities to the pool to take into account those excused because of the various excuses like no car, no ride, no babysitter were taken at the time of Petitioner's jury, though now at least someone goes through the excuses; however, "Generally, no further action is taken dealing with an excuse". (EHT I, 40-41; JA 620-621):

Dr. Michael Stoline is professor of mathematics and statistics at Western Michigan University, with a doctorate degree in 1967. (EHT I, 66; JA 623). At the first evidentiary hearing, he testified about jury selection figures for the October 1, 1993 to September 30, 1994 period, that covers Defendant Palmer, but not Petitioner Smith.

Dr. Stoline testified that Kent County has 112 census tracts. He divided these into 3 groups, those with the most African-American residents, those with a middle number of African-American residents, and those with the least African-American residents.

(EHT I, 72; JA 624). Of the 35 tracts with high black population, none of them were ever overrepresented on the jury, while 12 of them showed statistically significant underrepresentation. Of the 34 tracts with low black population, 5 of them were underrepresented, while 13 of them were overrepresented. (EHT I, 73; JA 625).

Of the high African-American population underrepresentations, 2 of them were as high as 40%. (EHT I, 76; JA 625). Through statistical analysis, he concluded that out of the 2,252 jurors who appeared at court, one would expect to have 164 blacks, but there were only 139 blacks. (EHT I, 77; JA 626).

Dr. Stoline testified that out of 11 jury terms in his 1993-1994 figures, that in 10 out of 11 there was significant underrepresentation of blacks, in two of them more than 40%. (EHT I, 80; JA 626). On average, that was a 15 % underrepresentation. (EHT I, 102-103; JA 630).

He also concluded that the extent of deviation was larger, and more consistently pointed away from blacks, as could be accounted for by chance. (EHT I, 81-82; JA 626-627).

Dr. Stoline explained the meanings of various terms in the tables he prepared. (EHT I, 86-92; JA 628-629).

Although African Americans constitute 7.28 percent of the potential jurors in Kent County, App. 179a, 214a, his venire panel of 60 to 100 prospective jurors included at most three African Americans. JA 6a-7a. The parties examined 37 potential jurors during *voir dire*, all of whom were white. App. 86a.

Dr. Stoline explained that with "unbiased random sampling" using this census data "as a

frame," the Kent County circuit courts should have expected to see 67.6 African-American prospective jurors (7.28 percent of 929 prospective jurors) on venire panels. *Id.* at 215a. However, Kent County's jury selection process produced the expectation of only 55.5 prospective African-American jurors on the juror list. *Id.* Thus, Dr. Stoline concluded that "there is an estimated under-representation of 12.1 Black residents (or 17.9 percent) from the 67.6 Black residents expected to be on the list if there were no bias in the selection process used." *Id.* He added that "[t]his estimated under-representation of Black residents is due to the fact that relatively fewer residents were observed to have been selected from those Kent County census tracts containing more Black residents." *Id.*

Richard Hillary of the Kent County Public Defenders Office has been the director of that office since 1985. (EHT I, 128; JA 631). He has handled over 130 jury trials. (EHT I, 129; JA 632). In 1992 or 1993, the Jury Minority Representation Committee was formed by the Kent County Bar Association. (EHT I, 130; JA 632). Hillary had noticed that "Back prior to 1993, or even halfway through 93 and up to 94, I recall there being very few, if any, minorities, specifically black potential jurors at all." "It had been a consistent problem since I began my practice in 1980." "If I said it in terms of percentages, 98% of the time we had all-white juries." (EHT I, 130; JA 632). The problem was frequently discussed by local attorneys and by the bench. (EHT I, 130; JA 632). Based on recommendations by the committee, the court in 1994 began sending out second mailings to those who did not answer the first mailing. Another change was to put stronger language in the letters as to sanctions for not appearing. (EHT I, 133-135; JA

633). Since those changes were made, "there has been a noticeable increase in the number of minorities that show up." (EHT I, 135; JA 633).

Mr. Hillary also testified that it was a concern of the committee that qualified jurors were first sent to District Court, then the leftovers would be sent to Circuit Court. In fact, jurors called to District Court, if they did not get on a jury, were not even put back into the pool for Circuit Court. After some months of study, they concluded that this caused too few minority residents to appear on Circuit Court juries. (EHT I, 135-136; JA 633).

Kurt Metzger of Wayne State University since 1990 was director of the Michigan Metropolitan Information Center, that does demographic and economic research. He has a master's degree in psychology, had almost completed his PhD program, and worked for the census bureau for 15 years. (EHT I, 142-144; JA 635). He was qualified as an expert in demographics and surveying techniques and in the use of census information. (EHT I, 147; JA 636).

Mr. Metzger testified that in surveys there are usually undercounts and a lower level of cooperation of African-Americans, of renters, of unmarried persons, of people who move their residences, and of those in poorer housing. The problem is worse when it is the government seeking the cooperation, because of fear and hostility toward government which is higher in the minority community. (EHT I, 148-149; JA 636-637). He identified some steps the Census Bureau has used to correct this problem: additional mailings, talks with community leaders, emphasis on confidentiality of information provided, and advertising. (EHT I, 151-152; JA 637).

Mr. Metzger testified that the same types of problems that keep people from jobs often keep them from jury service. He identified such things as transportation problems, single parent households and child care problems. (EHT I, 154-155; JA 638). He discussed certain statistics (EHT I, 156-157; JA 638-639).

Kent County statistics	African-Americans	Whites
Single parent households	64%	19%
Poverty households	31.5%	6.7%
Renters	59%	27%
Moved in last 15 months	32%	20%
No car	30%	6%

Mr. Metzger testified that if people were able to use an excuse for having no ride or babysitter, this would introduce an element of non-randomness into the selection process. In the case of Kent County, the statistics show that this would have a disproportionate effect on the presence of black persons on juries. (EHT I, 162-163, 178; JA 640, 641). Each of the factors that lead to a person not being on a jury, such as single families, moving, having no car, and lacking telephones, would lead to underrepresentation of black persons on juries. (EHT I, 164; JA 640).

At the second hearing on April 27, 1998, Dr. Stoline testified again, now provided with figures from the 1992-1993 jury term. Based on the figures he had from April 1993 to October 1993, he determined that the overall underrepresentation of

blacks on juries was 18%, which was higher than the 15% observed in 1993-1994. (EHT II, 9-10; JA 501).

During month 12 of the 1992-1993 year, which ended October 1, 1993, the underrepresentation of blacks was 34.8%, much higher than the half-year figure of 18% for April thru September, and more than twice as high as the 15.1% underrepresentation for the 1993-1994 year. (EHT II, 11, 15-17; JA 501-503). He reached the same conclusions about underrepresentation for this period as he did for the 1993-1994 period, except that the amount of underrepresentation is higher. (EHT II, 17-18; JA 503).

3. State court rulings.

An evidentiary hearing was held in this case. Judge Sullivan agreed that African-Americans were a distinctive group in the community. He found: ""defendant has established to this Court's satisfaction that there appears to have been an underrepresentation of blacks on the jury...Frankly, there appears to have been rather consistent underrepresentation." (Circuit Court Opinion, June 8, 1998; JA 174). He ruled, however, that there was no showing that the underrepresentation was "systematic."

The Michigan Court of Appeals found that there was underrepresentation, and that it was systematic.

The State appealed to the Michigan Supreme Court. That Court reversed in a majority opinion 5 pages long. In reversing, the Court discussed a variety of possible mathematical tests to use to measure underrepresentation, but ultimately ruled that the test to be used was not relevant to their decision. *People v. Smith*, 463 Mich. 199, 205 (2000):

> "[W]e give the defendant the benefit of the doubt on underrepresentation and proceed to the third prong of the Duren analysis.
>
> Assuming defendant has satisfied the first two prongs of the Duren analysis, defendant must still show that the underrepresentation of African American jurors was systematic."

The Michigan Supreme Court held that Respondent had not established the "systematic" nature of the assumed underrepresentation, and denied relief on that ground. *Id.* at 205-206.

The concurring opinion of two Justices reached essentially the same conclusion, that they would assume underrepresentation, but that "systematic" was not proven. *Id.* at 207:

> "[A]lthough I would grant him the benefit of the doubt on unfair and unreasonable underrepresentation, he has not shown systematic exclusion."

The concurring Justices noted that in the instant case, "a complete exclusion of black jurors would result in only a 7.28 percent absolute disparity." *Id.* at 217-218.

4. Federal court rulings.

The District Court denied Habeas Corpus relief, finding that "Petitioner failed to present evidence that the disparity occurred because the jury selection process itself caused the exclusion of the group." The Court agreed that "The Michigan Supreme Court concluded that Petitioner met the first prong and it gave Petitioner the benefit of the doubt on the second prong (unfair and unreasonable under-representation), but it held that Petitioner failed to

show that the underrpresentation was caused by the jury selection process used by Kent County."

The Court went on to hold:

> "Although Petitioner's witnesses testified that the statistical occurrence of fewer African-Americans was not random, Petitioner's own evidence showed that social and economic factors unrelated to Kent County's jury selection process provided another possible explanation."

The Sixth Circuit reversed by a 3-0 vote, holding "We find that Petitioner has demonstrated a violation of his Sixth Amendment right to a jury drawn from a fair cross-section of the community." They went on to explain:

> We find that the Michigan Supreme Court unreasonably applied federal law when it held that the underrepresentation of African Americans did not occur as a result of systematic exclusion. In the instant case, Petitioner demonstrated that African Americans were underrepresented on Kent County venire panels by between 15 and 18 percent over a period of 17 months and 34 percent in the month during which his jury was drawn. While this disparity may not rise to the level of demonstrating systematic exclusion per se, this persistent disparity combined with Petitioner's evidence that this disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*. *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) ("The extremely low probability that the underrepresent-

> ation would have occurred by chance alone provides further evidence that the system itself contributed to the lack of African-American participation in the venire pools."). Rather, for the reasons described below, Petitioner demonstrated that the underrepresentation of African Americans was "inherent in the particular jury-selection process utilized," and therefore met his burden to demonstrate that African Americans were systematically excluded from Kent County venire panels."

The Sixth Circuit answered the claim that social and economic factors were involved in the underrepresentation as follows:

> "Contrary to the conclusion reached by the Michigan Supreme Court, the Sixth Amendment is concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel."

The Sixth Circuit then focused on the "District Court draft" system that Kent County employed through the date of Respondent's trial, but later abandoned:

> "Moreover, those African Americans that actually appeared for jury duty were diverted away from circuit courts because of the priority given to the district court in Grand Rapids."

The state moved for rehearing en banc, and not one judge of the Sixth Circuit voted to grant that.

SUMMARY OF ARGUMENT

The fair cross-section requirement of the Sixth Amendment is integral to this country's core principles of representative democracy and the right to a fair trial. By ensuring the community's ability to participate in the civic process and serve as a check on the powers of government, the fair cross-section requirement is critical to the integrity of the justice system. In order for the Sixth Amendment to fulfill these fundamental goals, all eligible members of the community must be included in jury service. When distinctive groups are systematically excluded or underrepresented, these essential values are seriously compromised.

A defendant in a criminal trial is entitled to a jury drawn from a venire representative of a fair cross-section of the community from which the case is tried. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); U.S. Const. amend. VI. *Duren* applies a 3 factor test:

1. The underrepresented group is "distinctive."
2. The representation of the group in venires is not "fair and reasonable" in relation to the population.
3. The underrepresentation is systematic.

Under the Michigan Supreme Court ruling, only the third prong is really at issue. They said "[W]e give the defendant the benefit of the doubt on underrepresentation." Their holding is based on the third element of the underrepresentation being systematic. This case is therefore not a good vehicle for deciding an issue of a mathematical test for underrepresentation.

If the second prong is to be discussed, this is essentially a mathematical test, and Respondent has made the appropriate showings. We have a persistent pattern of underrepresentation for 15 out of 17 months. In Respondent's jury year, the underrepresentation was 18%, in his jury month it was 34%, and in the jury box it was 100%.

The absolute disparity test advocated by Petitioner would exclude most of the country from the protections of *Duren*. It is not a fair and reasonable way of determining underrepresentation.

"Systematic" has two reasonable meanings: produced by the system, or persistent. Respondent has made the requisite showings under either meaning.

The Michigan Supreme Court ruling was unreasonable for a variety of reasons, but primarily for finding that the system in place had no relationship to the underrepresentation.

Petitioner's claims that the AEDPA somehow blocks Habeas Corpus review in this case is unfounded. As this Court ruled in *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007), "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" The three factor test of *Duren* is sufficiently clear to be enforced.

ARGUMENT

I. THE QUESTIONS OF UNDERREPRESENTATION, AND THE TEST TO BE USED FOR MEASURING IT, ARE NOT GENUINELY MATERIAL TO THIS CASE.

Contrary to Petitioner's claim (Pet. Br. 21), the Michigan Supreme Court issued no "holding" that there was not underrepresentation.

The majority ruled: "[W]e give the defendant the benefit of the doubt on underrepresentation." The concurrence ruled: "I would grant him the benefit of the doubt on unfair and unreasonable underrepresentation," Both majority and concurrence proceeded to hold that any underrepresentation was not shown to be systematic, and ruled on that basis.

Underrepresentation or lack thereof formed no part of the Michigan Supreme Court's basis for decision, and the dictum cited by Petitioner was not dispositive of the case in that Court. [2]

Moreover, at oral argument in the Sixth Circuit, counsel for the present Petitioner made the following concession, at 17:08:

> "The trial court after an exhaustive hearing found that while African-Americans were consistently underrepresented, that underrepresentation was

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[2] The *Oxford Companion to the Supreme Court of the United States* (2005), states:

> "Holding, is a statement of law in a judicial opinion that is necessary to the resolution of the legal problem presented in the case. It is contrasted with a dictum, which is a gratuitous statement of opinion in a decision not necessary to the result in the case (see Obiter Dictum)."

> not shown to be systematic. That is the issue in this case. No one's doubting that in Kent County African-Americans were underrepresented on the juries."

There is certainly a question as to whether this case is an appropriate vehicle for Petitioner's quest to have this Court adopt an unfair new test for measuring underrepresentation, when the test to be used formed no part of the Michigan Supreme Court's basis for decision, and that very point was conceded by the present Petitioner at the Sixth Circuit oral argument.

II. THE SIXTH AMENDMENT RIGHTS PROTECTED IN DUREN ARE IMPORTANT TO BOTH SOCIETY AND INDIVIDUAL DEFENDANTS AS FEATURES OF REPRESENTATIVE DEMOCRACY.

A. The Foundation of *Duren* and *Taylor*.

In *Duren v. Missouri*, this Court established a three-part test for detecting violations of the Sixth Amendment's fair cross-section requirement that are caused by the unfair and unreasonable systematic underrepresentation of distinct groups on jury venires. 439 U.S. 357 (1979). *Duren* grew out of more than a century of this Court's precedents linking venire representativeness to this nation's democratic principles.

As this Court has explained, "the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). "[T]he exclusion from jury service of otherwise qualified groups is in direct opposition to our fundamental democratic concepts and ideals of representative government" because "the established tradition" is that "juries

[serve] as instruments of public justice . . . [and must] be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

The fair cross-section requirement "guards against the exercise of arbitrary power" and ensures that the community will serve as a check "against the overzealous or mistaken prosecutor." *Lockhart v. McCree*, 476 U.S.162, 174 (1986) (quoting *Taylor*, 419 U.S. at 174) (internal quotation marks omitted). Fundamentally, it "preserv[es] 'public confidence in the fairness of the criminal justice system,' and . . . implement[s] our belief that 'sharing in the administration of justice is a phase of civic responsibility.'" *Id.* at 174-75 (quoting *Taylor*, 419 U.S. at 530-31). Thus, "the proper functioning of the jury system and . . . our democracy" is rooted in the "jury as a cross-section of the community." *Glasser v. United States*, 315 U.S. 60, 85-86 (1942), *superceded by statute as stated in Bourjaily v. United States*, 483 U.S. 171 (1987). [3]

In *Taylor v. Louisiana*, this Court concluded that "[t]he unmistakable import of this Court's opinions . . . is that the selection of a petit jury from a

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[3] "Those eligible for jury service are to be found in every stratum of society," *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946), and the absence from jury service of distinct groups is "at war with our basic concepts of a democratic society and a representative government." *Smith*, 311 U.S. at 130; *see also Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986) (the wholesale exclusion of women, African Americans and Mexican-Americans "clearly contravened ... the purposes of the fair-cross-section requirement"); *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972) ("[T]he Constitution forbids ... systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels," and groups have "the right to participate in the overall legal process by which criminal guilt and innocence are determined.").

representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528. After discussing the value of the "commonsense judgment of the community as a hedge against" the "exercise of arbitrary power," the Court explained that a "jury pool . . . made up of only special segments of the populace" or one in which "large distinctive groups are excluded from the pool" cannot properly function. *Id.* at 530. The Court declared that "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Id.*

Duren drew on the principles espoused by *Taylor* to establish a test for a *prima facie* violation of the fair cross-section requirement. It declared that:

> "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

439 U.S. at 364. *Duren* thereby created a workable mechanism for eliminating the exclusion or underrepresentation of distinct groups, which had been condemned by the Sixth Amendment.

The interest in representative juries is important not only to the individual defendant, but to

society at large. When a minority community has the experience of seeing nothing but white faces on the jury case after case [4], that has a demoralizing effect on the community, and affects the perceived legitimacy of the judgments issued by the courts.

It also affects the overall reliability of judgments. Can it really be said that a lifetime of experience living in the African-American community of Grand Rapids would provide no insights helpful in judging the testimony of members of that community? Customs in the inner-city community might very well be differently understood by someone with experience in that community. Even the meaning of words can in some cases be different.

In a case that is extremely weak, but the defendant is a large, muscular, threatening-looking African-American, appearance might very well have had an impact on the result. It is possible his appearance would have had less impact if an African-American juror explained that he knew tall, muscular black men who were gentle. [5]

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[4] Richard Hillary of the Defender's Office testified to his observations of this time period: "98% of the time we had all-white juries." (EHT I, 130; JA 632).

[5] These effects exist even if none of the jurors harbors racial prejudice, but are enhanced when undisclosed racial prejudice is present. The all-white status of the jury, versus the African-American background of his client, was obviously of major concern to defense counsel. He inquired about it of the venirepersons again and again. (T 42-45, 63, 75, 79-80, 98, 105, 108-109, 116, 120, 123-124, 129, 133, 137, 141; JA 434-436, 441, 444, 446-447, 453, 456, 458,-459, 461, 463, 465, 467, 468, 470). Yet, all 37 of these white people swore that they were not prejudiced against blacks. This shows that the value of voir dire in discovering hidden racial prejudice is practically nonexistent. Is there anybody, familiar with the history of our society, who

The whole point of the 12-person jury system is to have diversity on the jury, so that the broadest range of experience is brought to bear on solving society's problems in a courtroom. Neither the minority community nor majority community benefits from practices that have a track record of measurably reducing diversity in a consistent way.

The nature of *Duren*, however, is that society has no direct vehicle to enforce these societal rights, and thus must rely on the vindication of these rights by defendants dissatisfied with the result, who make the proper objections and the exhaustive showings required under *Duren*. Thus, Respondent stands in part as a surrogate enforcing society's interest.

He also stands in part as a surrogate for the other defendants who also were compelled to be tried by a mostly all-white jury system, but who were unable to get someone to take on the immense burden of making the showings required by *Duren*.

We submit this Court has not been inundated with appeals by the states or the U.S. Government complaining of defendants winning on this ground.[6]

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would believe that out of 37 randomly selected white people, not one would harbor racial prejudice against blacks?

[6] In reviewing the *amicus* brief of Connecticut and 13 other states, it is interesting to note that the remaining 35 states and the US government are not there. Considering that they claim to speak for the states, and for a state to join in would require little more than a return phone call or email, one wonders why those other states are not on board. Perhaps that is because those other states feel they do not have a problem, and these states fear they do.

Note that their brief did not assert these jurisdictions are taking any action to alleviate underrepresentation, nor did they mention even a single case reversed by a court in their jurisdictions on this ground.

The cost of one defendant getting a new trial [7] is insignificant compared to the cost of telling court systems the pressure is off, don't worry about underrepresentation.

Petitioner claims that (Pet. Br. 43) that following any rule that would apply to their county at all would "create a self-conscious process based on race and ethnicity to ensure that the venires match the relevant population percentages." But there are many constitutional ways of increasing minority presence on juries, following the principles stated in *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007) (Justice Kennedy, concurring). Jurisdictions could take race-

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[7] It may be more than one. In *Parks v. Warren*, (E.D. Mich No. 05-10036, the following appears in the Petitioner's supplemental brief: "There appears to be no genuine factual dispute about the events giving rise to this litigation. As explained in greater detail below, in April of 2001, a computer glitch in the Kent County Circuit Court Jury Department resulted in the exclusion of nearly seventy five percent of Kent County residents from the jury pool. Of those remaining in the jury pool, the computer glitch resulted in the overrepresentation of potential jurors from some zip codes and the underrepresentation of potential jurors from other zip codes. Because of the geographic distribution of Kent County's African American and Hispanic populations, this computer glitch resulted in a substantial underrepresentation of these minority groups in the jury pool. The glitch was discovered and fixed in August of 2002. Petitioner's petit jury and jury venire were drawn from the problematic jury pool."

That is in part what this case is all about. Kent County hopes to win the *Parks* case and at least two others known to counsel, by winning this case. In fact, these zip code cases would be a far more suitable vehicle than this case for considering the questions presented by Petitioner. They also illustrate the wisdom of the 8-1 decision in *Duren* not to require an intent to discriminate.

neutral steps (e.g. providing rides or babysitters, taking action for failure to appear, paying jurors a reasonable wage, free parking, etc.) while being conscious those steps may improve and are intended to improve the level of minority presence on juries. [8]

B. Each Prong Of *Duren*'s Three-Part *Prima Facie* Test Is Rooted In This Court's Long-Standing Commitment To Enforcing The Sixth Amendment's Fair Cross-Section Requirement.

1. Distinctive Groups

Although this Court "ha[s] never attempted to define the term 'distinctive group' . . . [,] the concept of 'distinctiveness' must be linked to the purposes of the fair-cross-section requirement," *Lockhart*, 476 U.S. at 174 (citations omitted). Thus, African-Americans, women, and Mexican-Americans have been properly designated "distinctive groups" because these groups have often been absent or nearly so from juries "for reasons completely unrelated to the[ir] ability . . . to serve as jurors." *Id.* at 175. This caused "the composition of juries [to] be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community," "undeniably gave rise to an 'appearance of unfairness'" and "improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases." *Id.* Thus, "the wholesale exclusion of these large groups from jury service clearly contravened" the purposes of the fair cross-section requirement. *Id.* at

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[8] Or, in jurisdictions like Michigan that allow it for good cause, M.C.R. 6.412(E)(2), grant additional peremptory challenges, which was requested in this case as a remedy for the underrepresentation, but was denied. (T 148; JA 472).

175 (citing *Peters v. Kiff*, 407 U.S. 493 (1972); *Duren, supra*; *Taylor, supra*; *Casteneda v. Partida*, 430 U.S. 482 (1977)).

Petitioner suggests that relatively smaller groups in a given jurisdiction, like African-Americans in Kent County, are beyond the purview of *Duren*. Pet. Br. at 46. We submit this to be not only incorrect, but alarming. See *United States v. Ashley*, 54 F.3d 311 (7th Cir. 1995) (population 3% black, but none appeared on juries, held to be only a 3% shortfall (rather than 100%), and thus not constitutionally significant); *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989) (court holds since there are not many Hispanics in Idaho, it does not matter that there is underrepresentation on jury venires, because the absolute disparity is always going to be less than 10% because the Hispanic population is less than 10%).

Notably absent from this Court's jurisprudence on the meaning of the phrase "distinctive group" is a size limitation. This should come as no surprise, because, as previously noted, the concept of "distinctiveness" derives its meaning from the purposes of the fair cross-section requirement: guarding against bias, ensuring fairness to the defendant, public confidence in criminal adjudications, and involving the community in the administration of justice. *Lockhart*, 476 U.S. at 174-75. Exclusion of smaller distinct groups undermines these goals just as profoundly as excluding larger distinct groups. Thus, "distinctive groups" may be of any significant size as long as they have a capacity to implicate the fundamental purposes of the Sixth Amendment in their opportunity to serve as jurors.

2. Fair and Reasonable Representation

Duren's second requirement measures the fairness and reasonableness of distinctive groups' representation on jury venires relative to their size in the community. This is a direct outgrowth of the Sixth Amendment's command that a jury be drawn from a representative cross-section of the community. *Taylor*, 419 U.S. at 528.

The most commonly used tools for measuring representation are the absolute disparity and comparative disparity tests.[9] "Absolute disparity . . . is defined as the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire." *Ramseur v. Beyer*, 983 F.2d 1215, 1231 n.15 (3d. Cir. 1992) (citing National Jury Project, *Jurywork: Systematic Techniques*, § 5.05 [2][c][i], [ii], and [iv] (1983)). "Comparative disparity is calculated by dividing the absolute disparity by the population figure for a population group. It measures the diminished likelihood that members of the underrepresented group, when compared to the population as a whole, will be called for jury service." *Id.* (citing David Kairys, Joseph B. Kadane & John P. Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 790-91 (1977)). Because each method has shortcomings, the determination of which method is appropriate for analyzing representation in a given situation must be made on a case-by-case basis.

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[9] In *Casteneda*, a case concerning an Equal Protection challenge to underrepresentation of Mexican Americans on grand juries, this Court analyzed another measure called "statistical significance," which is not at issue in these proceedings. 430 U.S. at 496 n.17.

The majority of circuit courts consider multiple mathematical tools for measuring representativeness.[10] *See United States v. Jackman*, 46 F.3d 1240, 1246-47 n.4 (2d Cir. 1995) (examining facts and declining to use absolute numbers[11] approach to measure underrepresentation); *United States v. Weaver*, 27 F.3d 231, 240-44 (3d Cir. 2001) (reviewing criticisms of each analytical method and stating that "[b]ecause we think that figures from both methods inform the degree of underrepresentation, we will examine and consider the results of both in order to obtain the most accurate picture possible"); *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3d Cir. 1992) (reviewing each statistical analysis); *United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980) (discussing but then declining to apply comparative disparity measure where distinct group at issue comprised more than 10 percent of the community); *United States v. Butler*, 615 F.2d 685 (5th Cir. 1980) (clarifying *Maskeny* by stating that "[w]e did not wish

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[10] Even courts that have placed greater weight on one particular analytical method recognize the significant shortcomings of their choice. *See United States v. Rodriguez-Lara*, 421 F.3d 932, 943 n.10 (9th Cir. 2005) ("[A]bsolute disparity is also problematic" because it offers no redress to distinctive groups that comprise small percentages of the population as it would allow such groups to be "entirely shut out of the jury pool."); *United States v Royal*, 174 F.3d 1, 7 n.3 (1st Cir. 2000) (implementing absolute disparity, noting the longstanding debate over the use of comparative and absolute disparity and stating that "our endorsement of one should not be taken as a statement that it is the best of all possible methodologies").

[11] "The absolute numbers approach [measures] how many individuals from the distinctive group would have to be added to a randomly drawn venire to make that venire representative with respect to the excluded group." *Jackman*, 46 F.3d at 1246 n.4.

to imply that the absolute disparity method is the sole means of establishing unlawful jury discrimination. However, given the small absolute disparities proven and the fact that a 'less-than-10 [percent] minority' was not at issue, we did not feel consideration of other statistical methods was necessary in this case"); *Foster v. Sparks*, 506 F.2d 805, 834-35 (5th Cir. 1975) ("[A]n intractable use of the absolute measure may . . . produce distorted results," and "flexible use of the two measures is advisable, with the selection of either to be guided by both a desire to avoid distorted results and a need to adequately protect the interests of those challenging the selection system."); *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996) (examining both comparative and absolute disparity measures in rejecting a Sixth Amendment fair cross-section challenge based on the exclusion of youth from venires); *United States v. Rogers*, 73 F.3d 774, 776-77 (8th Cir. 1996) (recognizing that while "both [absolute and comparative] figures provide a simplified statistical shorthand for a complex issue, the comparative disparity calculation provides a more meaningful measure of systematic impact *vis-à-vis* the 'distinctive' group: it calculates the representation of African Americans in jury pools relative to the African-American community rather than relative to the entire population."); *United States v. Orange*, 447 F.3d 792, 798 (10th Cir. 2006) (while "absolute disparity is the starting point for other methods of comparison in [the Tenth] Circuit," the Circuit has "consistently relied upon" both comparative and absolute disparity measurements); *United States v. Chanthadara*, 230 F.3d 1237, 1256-57 (10th Cir. 2000) (same and noting that "absolute disparities are of a limited value when considering small populations"); *United States v. Shinault*, 147

F.3d 1266, 1272-73 (10th Cir 1998) (same and noting the deficiencies in both methods).

A number of state supreme courts do the same. *See Washington v. People*, 186 P.3d 594, 605 (Col. 2008) ("[N]o specific statistical analysis should be excluded in a court's analysis of a constitutional fair cross section claim, and that a court should evaluate all the statistical evidence presented. . . ."); *State v. Williams*, 525 N.W. 2d 538, 543 (Minn. 1995) (there must be reliance on more than one "particular statistical tool" in determining whether a group is fairly represented in a venire); *Williams v. State*, 125 P.3d 627, 631 (Nev. 2006) (looking to both comparative and absolute disparity measure in denying claim); *Evans v. State*, 926 P.2d 265, 275 (Nev. 1996) (same); *State v. Gibbs*, 758 A.2d 327, 336-37 (Conn. 2000) (the facts and circumstances of each case drive the choice of the proper statistical method); *Lovell v. State*, 702 A.2d 261, 281 (Md. 1997) (Maryland state courts may "supplement[ ] absolute disparity with comparative disparity [figures] in cases involving a distinctive group comprising less than ten [percent] of the total population in the county. . . ."); *Diggs v. United States*, 906 A.2d 290, 297 (D.C. 2006) (courts generally rely on absolute and comparative disparity to determine whether representation of a population is fair and reasonable in the venire); *Azania v. State*, 778 N.E. 2d 1253, 1260 (Ind. 2002) (applying both absolute and comparative disparity in evaluation of challenge to jury selection process); *State v. Dixon*, 593 A.2d 266, 271 (N.J. 1991) (looking to comparative disparity, absolute disparity and statistical significance tests in examining a fair cross-section and equal protection challenge to jury selection process); *State v. Lopez*, 692 P.2d 370, 377 (Idaho 1984) (declining to adopt

one statistical measure and ruling that comparative disparity should be "viewed in conjunction with absolute disparity"); *People v. Burgener*, 62 P.3d 1, 22 (Cal. 2003) (the California Supreme Court "ha[s] repeatedly declined to adopt any one statistical methodology to the exclusion of others" for measuring underrepresentation).

3. Systematic Underrepresentation

Like the first two requirements for establishing a *prima facie* case, the task of demonstrating that the "underrepresentation is due to systematic exclusion of the group in the jury selection process" is grounded in this Court's Sixth Amendment jurisprudence. *Duren*, 439 U.S. at 364. *Duren* defined systematic exclusion as a phenomenon that is "inherent in the particular jury-selection process utilized." 439 U.S. at 669. Pursuant to *Duren*, Sixth Amendment fair cross-section claims do not require a showing of intentional discrimination and are thus distinct from Fifth and Fourteenth Amendment Equal Protection claims. *Id.* at 368 n.26 (Under Equal Protection, statistical discrepancy "not only indicated discriminatory *effect* but also was one form of evidence of another essential element of the constitutional violation — discriminatory *purpose*." (emphasis added)). "[D]isproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." *Id.* at 670 n.26.

Sixth Amendment fair cross-section claims, therefore, are not concerned with "whether the defendant has been unlawfully discriminated against because he was white, or whether the excluded jurors have been unlawfully discriminated against because they were black, but whether the defendant has been denied the right to 'trial . . . by impartial jury.'"

Holland, 493 U.S. at 487-88 (citation omitted). Sixth Amendment jurisprudence is instead targeted towards the systematic underrepresentation that impairs principles of democracy and representativeness, the integrity of the criminal justice system, and the ability of the jury to serve as a check on government power.

III. PETITIONER'S POSITION THAT AFRICAN-AMERICANS WERE NOT UNDERREPRESENTED CANNOT WITHSTAND SCRUTINY, AND PETITIONER'S REQUEST TO ENGRAFT AN ABSOLUTE DISPARITY TEST ONTO *DUREN* SHOULD BE REJECTED.

The Michigan Supreme Court's dictum that that African Americans were not underrepresented in Kent County circuit court jury pools is unreasonable on this record, and contradicts this Court's precedent. Certainly, the majority opinion makes no effort to explain the conclusion, beyond declaring that there is more than one test to apply and they are considering them all at once.

In this case, the African-American jury-eligible population was 7.8%. In Respondent's jury year, the African-American underrepresentation was 18%, in his jury month it was 34%, and in the jury box it was 100%.

In *Norris v. Alabama*, 294 U.S. 587 (1935) (not a Sixth Amendment case), the Court found underrepresentation where the African-American population was only 7.2% of the population.

When the Court in *Norris* stated that there was "total exclusion from juries," 294 U.S. at 599, the Court was using the comparative disparity test. The Supreme Court said there was a total, i.e. 100%,

shortfall, which is a comparative disparity analysis. The Supreme Court did not say there was a 7.2% shortfall, which would be an absolute disparity analysis.

While over the decades there was judicial progress in securing fair representation of minorities on juries from various impedances, there was a substantial setback in *Swain v. Alabama*, 380 U.S. 202 (1965) (not a Sixth Amendment case), where the Court denied relief even though the Petitioner had presented evidence that "no Negro has actually served on a petit jury since about 1950." *Duren* and *Batson v. Kentucky*, 476 U.S. 79 (1986) reversed that unfortunate trend, and we feel these were appropriate decisions that should be protected against erosion.

Petitioner ignores that places where minority population is somewhat small are the very places where that population is most in need of protection. What good is a rule that allows defendants to complain in Detroit, where minorities have political power and thus no need to complain, but withholds the right to complain in Lansing, Jackson, and Grand Rapids? [12]

The absolute disparity test treats the difference between 50% and 45% as being equivalent to the difference between 5% and zero. Comparative disparity would record the first situation as a 10% shortfall and the second as a 100% shortfall. Comparative disparity shows the situation as it is, while absolute disparity, in this example, uses

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[12] Census Bureau 2008 figures show that in 10 Michigan counties defendants would enjoy the possibility of receiving the rights delineated in *Duren*, while in the other 73 counties they would not.

mathematical trickery to make the unequal appear equal.

An absolute disparity in representation that has no impact on a county with a large distinctive group population can have a devastating impact in a county with a much smaller distinctive group population. This is like when a person loses $20.00. If the person has a lot of money the loss will have trivial effect. If the person is broke the loss may be catastrophic. It is more accurate to describe the loss as losing everything, or losing a tiny fraction of everything. If you agree with that last statement, then you agree with the comparative disparity test.

One court has noted that absolute disparity "is of questionable validity when applied to an underrepresented group that is a small percentage of the total population. . . . [A]n underrepresentation of such a group that can be 'remedied' by adding only one or two members to a typical venire can lead to the selection of a large number of venires in which members of the group are substantially underrepresented or even totally absent." *Jackman*, 46 F.3d at 1247; *see also Chanthadara*, 230 F.3d at 1256 (10th Cir. 2000) ("absolute disparities are of a limited value when considering small populations"); *Shinault*, 147 F.3d at 1273 (10th Cir. 1998) (complete exclusion of a distinctive group that makes up a small percentage of a population results in insignificant absolute disparity).

Petitioner has claimed that denying relief to the state would mean that a person's rights will depend on where one lives. (Pet. 19). This ignores the fact that the rule Petitioner wants enshrined as law would do exactly that, by making the public's access to the right of juries that fairly represent the community as dependent on whether the minority

population of the jurisdiction is large enough. If the minority figure is less than 10%, under Petitioner's proposed rule, the defendant loses before he even starts. In those places, the Sixth Amendment right would not exist at all, if Petitioner gets its way.

Data from the Census Bureau reveal that hundreds of counties — representing 49 of the 50 states — contain at least one constitutionally distinct group comprising less than 10 percent of the local population. According to the Census Bureau's 2008 Population Estimates,[13] of 3,220 counties in the United States and territories, 342 have an African-American community comprising less than 10 percent (but more than five percent) of the population. For Asians, this number is 64 counties; for Native Americans, 87 counties; and for Hispanics, 414.[14] In total, 817 counties — representing 49 states and over 142 million individuals — have at least one constitutionally distinct group comprising between 5 and 10 percent of its population. Thus, under Petitioners' 10 percent absolute disparity regime, the following groups could be *entirely excluded* from jury venires without offending the Sixth Amendment:

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[13] The Census Bureau's Population Estimates Program (PEP) develops interim estimates of the population by age, sex, race, and other attributes. PEP data represents the Bureau's official census estimates for each year between the decennial census. *See* U.S. Census Bureau, Population Estimates Program – American Factfinder, http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=sp3_pop_est (last revised Mar. 24, 2009).

[14] U.S. Census Bureau data do not offer detailed figures on the size of the *jury-eligible* composition of each racial group but instead reflect overall population size for each racial group.

- African Americans in Los Angeles County, California (9.45 percent of 9,862,049 county residents)
- Asians in Cook County, Illinois (encompassing Chicago) (5.83 percent of 5,294,664 residents)
- Asians in Harris County, Texas (encompassing Houston) (5.57 percent of 3,984,349 residents)
- Hispanics in Fulton County, Georgia (encompassing Atlanta) (8.35 percent of 1,014,932 residents)
- African Americans in San Francisco County, California (6.76 percent of 808,976 residents)

This Court should reject Petitioners' proposal in light of its real-world impact on democracy and the wholesale effect on the constitutional right to a fair trial. A 10 percent absolute disparity threshold provides a safe harbor for Sixth Amendment violations. [15] Under Petitioners' proposal, the Sixth Amendment offers no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold. Such a result cannot be reconciled with the Sixth Amendment or *Duren*.

The Circuit Court, familiar with local conditions, made this observation:

> "defendant has established to this Court's satisfaction that there appears to have been an underrepresentation of blacks on the jury. . . . Frankly, there appears to have been rather consistent underrepre-

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[15] Including the Kent County zip code cases referred to in footnote 6.

sentation." (Circuit Court Opinion, June 8, 1998; JA 174).

Unless, of course, you employ "absolute disparity," in which case the persistent pattern of all-white juries does not look so bad.

Petitioner's argument for this test is based largely on Circuit Court authority rather than any well-explicated reasons. Bizarrely, they argue the reverse of what should appear obvious; they argue that the smaller the minority population in a jurisdiction, the more the absolute disparity test ought to be used. (Pet. Br. 42-43). We submit that is exactly backwards, and that comparative disparity is most needed when the minority population is small. Petitioner's test would "lead to the selection of a large number of venires in which members of the group are substantially underrepresented or even totally absent." *Jackman*, 46 F.3d at 1247.

Where, as here, the minority population comprises less than 10 percent of the population, the absolute disparity test – as tethered to a 10 percent threshold – yields meaningless results. *See* Kairys, *supra*, 65 Cal. L. Rev. at, 795 (in cases like the present one, the comparative disparity measurement is preferable to other methods because "its results are not affected by the size of the sample or the proportion of the population in the specified category"); *id.* at 796 ("[A]pplication of the absolute disparity standard where the cognizable class is small means that almost all underrepresentations of small and medium-sized minorities – even total exclusions – are validated, for by definition, a small minority can never have a large absolute disparity.").

Petitioner suggests that minority communities that comprise less than 10 percent of the population

would still be protected because "equal protection safeguards would remain available to protect against intentional exclusion from the jury selection process." Br. 47-48. We submit that removing *Duren* protections is not an effective way of dealing with underrepresentation. Petitioner's argument ignores that defendants seeking to prove an equal protection violation carry a burden substantially higher than that imposed on defendants seeking to prove a fair cross-section violation because an Equal Protection claim, unlike a Sixth Amendment claim, requires proof of discriminatory intent. *Duren*, at 670.

Petitioners' proposal would irrationally allocate constitutional rights based on the arbitrary factor of a jurisdiction's population size. Violations of the Sixth Amendment's fair cross-section requirement do not concern the discriminatory and intentional exclusion of potential jurors, but instead the defendant's right to a jury drawn from a representative pool of citizens. *Holland*, 493 U.S. at 487-88.

There are over 40,000 African-Americans residing in Kent County. African-Americans by the thousands are being denied the equal right to serve on a jury, and black defendants are being denied the equal right to have persons of their own race have a fair chance to sit on their juries.

Sixth Amendment jurisprudence is and should remain targeted against persistent and systematic underrepresentation that impairs principles of democracy and representativeness, the integrity of the criminal justice system, and the ability of the jury to serve as a check on government power.

IV. THE UNDERREPRESENTATION OF AFRICAN-AMERICANS IN THE JURY POOL IN KENT COUNTY WAS SYSTEMATIC, AND THE STATE COURT UNREASONABLY RULED OTHERWISE.

A. Systematic As Being Persistent.

One way of determining whether a particular problem is systematic, or simply the result of chance, is to look at whether it keeps happening.

In this case, of the 17 jury months for which we have figures, from April 1993 to August 1994, in 15 of those months there was underrepresentation of African-Americans among those called to be jurors in Kent County Circuit Court. (See Exhibits G and H, Apx., EHT II, 50, 75; JA 239, 258, 511, 517). This is a consistent pattern stretching over a 17 month period. By showing that it happens repeatedly, one necessarily shows that it is systematic.

If the underrepresentation were not caused by the method of selecting those to appear for jury service, the only remaining possibility is chance. Dr. Stoline testified, without contradiction, that the persistent underrepresentation went beyond that which could be caused by simple chance. (EHT I, 81-82; JA 627).

In *People v. VanderVliet*, 444 Mich. 52, 79-80 (1993), the Court accepted this kind of statistical analysis to demonstrate facts. As the Court noted in *VanderVliet*, footnote 35, "The man who wins the lottery once is envied; the one who wins it twice is investigated." To analogize, the Kent County Circuit Court played the lottery 17 times, with chance making it just as likely that blacks would be overrepresented as underrepresented. The lottery came up with blacks underrepresented 15 times. We

would not tolerate such results even from a roulette wheel; we certainly cannot deem them acceptable coming from a court system.

Repeated results are systematic even when not done the majority of the time. See *National R.R. Passenger Corp. v. Morgan*, 535 U.S. 101 (2002) (one proves something to be systematic when it is shown to be "serial or systemic"); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (corporation systematically advertised in state where it did so 3 times in 12 months); 17 U.S.C. § 106(a) (copying of copyrighted material can be deemed systematic even if it happens fewer than 5 times); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F,3d 883 (6th Cir. 2002) (contacts were "systematic" where they were "something more than random, fortuitous, or attenuated"); *Jane Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) (6 instances of sexual abuse over 20 months (approximately 600 days, or once in 100 days) constituted "systematic" sexual abuse). One would think that 15 out of 17, far more than a simple majority, would qualify as systematic, but to the Michigan Supreme Court, it is merely random coincidence.

The state court's definition of systematic was unreasonable even under state authority. *See People v. Perez-DeLeon*, 224 Mich. App. 43 (1998) (persistent overbillings demonstrate systematic overbillings); *Recorders Court Bar Ass'n v. Wayne Circuit Court*, 443 Mich. 110 (1993) ("the fixed-fee system currently utilized in the Third Circuit Court and the Detroit Recorder's Court systematically fails to provide 'reasonable compensation' within the meaning of M.C.L. § 775.16" because "the fixed-fee system creates a situation in which attorneys whose clients plead guilty earlier in the criminal process are

relatively overcompensated for their efforts when compared to the compensation provided to attorneys whose clients do not." – no statistics cited to support court's finding); *In re Leon Jenkins*, 437 Mich. 15 (1991) (14 fixed tickets by judge, presumably out of thousands of ticket matters handled, showed "systematic" ticket fixing); *Kircos v. Goodyear Tire & Rubber Co*, 70 Mich. App. 612 (1976) (company had "systematic" contacts with Michigan where more than 1% of its sales were in Michigan). We submit that by any of these standards, 15 out of 17 is systematic.

B. Systematic As Caused By The System.

Another meaning of "systematic" is that the result is produced by the method or "system" used to select from the population at large the small number who appear in jury pools. If not produced by chance, the results are necessarily produced by the system. Other than chance, and the system, nothing more remains.

Petitioner claims that "social and economic factors" led to the underrepresentation. This claim ignores two critical points. As the Sixth Circuit aptly ruled, the fault is not that African-Americans have fewer cars or more single-parent families; the cause is that "the particular *system* of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel."

The second is that the state did not prove what caused the underrepresentation. The Michigan Supreme Court unreasonably failed to heed the ruling of *Duren* that:

> "However, once the defendant has made a prima facie showing of an infringement of his constitutional right to

> a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest."

The ruling of the Michigan Supreme Court did not require the prosecution to make the required showing, and they did not do so voluntarily.

In *Duren v. Missouri*, the Court used a statistical analysis similar to that used by Dr. Stoline to conclude that underrepresentation of women was systematic:

> "The first sign of a systematic discrepancy is at the next stage--the construction of the jury wheel from which persons are randomly summoned for service. Less than 30% of those summoned were female, demonstrating that a substantially larger number of women answering the questionnaire claimed either ineligibility or exemption from jury service. Moreover, at the summons stage women were not only given another opportunity to claim exemption, but also were presumed to have claimed exemption when they did not respond to the summons. Thus, the percentage of women at the final, venire, stage (14.5%) was much lower than the percentage of women who were summoned for service (26.7%).
>
> The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the system by which

> juries were selected. Petitioner demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria--whether the automatic exemption for women or other statutory exemptions – as implemented in Jackson County. Women were therefore systematically underrepresented within the meaning of Taylor."

Here, as in *Duren*, the system as implemented in Kent County at the time of Petitioner Smith's trial resulted in persistent underrepresentation of African-Americans, and therefore systematic underrepresentation.

This is not a case, such as *United States v. Allen*, 160 F.3d 1096 (6th Cir. 1998), where "The Judge stated that this was the first time he had ever seen a panel without any blacks on it." Richard Hillary of the Kent County Public Defender's Office noticed that "Back prior to 1993, or even halfway through 93 and up to 94, I recall there being very few, if any, minorities, specifically black potential jurors at all." "It had been a consistent problem since I began my practice in 1980." "If I said it in terms of percentages, 98% of the time we had all-white juries." (EHT I, 130; JA 632). Evidence at the hearing also showed that the circuit judges had long been aware of the problem. (EHT I 131-133; JA 632-633).

The system used in Kent County gave these results. A different system would give different results. The underrepresentation is necessarily systematic where it is a result of the system used.

The Michigan Supreme Court unreasonably defined "systematic." While they gave lip-service to

following the ruling of *Duren* (holding that systematic means "inherent in the particular jury-selection process utilized") in fact they ruled precisely the opposite of *Duren*. The United States Supreme Court ruled:

> "Finally, in order to establish a prima facie case, it was necessary for petitioner to show that the underrepresentation of women, generally and on his venire, was due to their systematic exclusion in the jury-selection process. Petitioner's proof met this requirement. His undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic - that is, inherent in the particular jury-selection process utilized."

Rather than following this Court's holding in *Duren*, the Michigan Supreme Court ruling appears to take direction from the *dissent* in *Duren*, which finds that systematic underrepresentation of women is not the same as exclusion of women. The ruling of the majority in *Duren* expressly finds such analysis to be improper.

Here, Petitioner showed that there was a discrepancy for 15 out of 17 months, not just occasionally. According to the United States Supreme Court, such a statistical showing is sufficient to show systematic underrepresentation. According to the Michigan Supreme Court in this case, such a statistical showing proves nothing. Yet, as the Court held in *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir. 1992):

> "if a disparity is sufficiently large over a significant period of time, then it is unlikely that the disparity is due solely to chance or to accident, and in the absence of evidence to the contrary, a court should conclude that racial or other class-related factors entered into the selection process."

In this case, of the 17 jury months for which we have figures, from April 1993 to August 1994, in 15 of those months there was underrepresentation of African-Americans among those called to be jurors in Kent County Circuit Court. (See Exhibits G and H, EHT II, 50, 75; JA 239, 258, 511, 517).

In the half year of April through September, the underrepresentation was 18%, while the underrepresentation for the 1993-1994 year was 15.1%. The underrepresentation for September 1993, when Petitioner's trial was held, was 34.8%. It was unreasonable to hold these shortfalls statistically insignificant. It might have been reasonable to hold such figures insignificant if they had been a one-shot aberration, and not been part of a persistent and consistent trend of underrepresentation that happened month after month. But, it kept happening again and again. According to the Michigan Supreme Court, persistent underrepresentation means nothing.

It is true that in the *Duren* case the state of Missouri had a specific rule that allowed exemptions to women. In this case, the rules that were being applied were hidden rules. No records were kept. No rules were published about requests to be taken off jury service. No rules were published about people who did not receive jury summons, or people who ignored them.

Petitioner argues that the Sixth Circuit erred in finding systematic exclusion because Mr. Smith purportedly lacked "concrete evidence" and relied on "anecdotal accounts." Pet. Br. at 57. However, a reviewing court, even on habeas review, may draw logical inferences from the undisputed factual record, which in this case goes well beyond anecdotes. Indeed, the *Duren* Court rejected similar arguments when accepting six-year old census figures that "might not precisely mirror the percentage of women registered to vote" explaining that "there [was] no evidence whatsoever in the record to suggest that the . . . census data significantly distorted the percentage of women in Jackson County at the time of trial." 439 U.S. 363-65.

Because Respondent made several showings about factors that caused the underrepresentation, and was unable to point to any *single* "smoking gun," the Michigan Supreme Court apparently found that the prosecution's burden was met. We submit that was highly unreasonable. Constitutionally, Petitioner was not required to show why the Kent County Circuit Court persistently and systematically had underrepresentation of blacks on juries. Under *Duren*, the prosecution had the duty of showing why such underrepresentation was necessary to meet "significant state interests." The Michigan Supreme Court wrongly and unreasonably failed to require such showings from the prosecution.

Duren did not demand unequivocal proof that the automatic exemption for women in that case was the sole cause of the underrepresentation. Rather it found a *prima facie* case of a fair cross-section violation where this exemption was a "*possible* cause of the disproportionate exclusion of women on [the]

venires . . . ." *Id.* at 369 (emphasis added); *see also Davis v. Warden*, 867 F.2d 1003, 1014 (7th Cir. 1989)

The statistics alone are sufficient to show systematic underrepresentation. The observations of Mr. Hillary, alone, are sufficient to show systematic underrepresentation. The observations of Mr. Foster, alone, are sufficient to show systematic underrepresentation. This would be so even if we had no evidence showing why the system produced these results. But, we do have such evidence.

C. Systemic Causes Of Underrepresentation Relied On By The Court Of Appeals.

The Sixth Circuit ruled on the basis of a single systematic cause, the "District Court draft":

> [T]hose African Americans that actually appeared for jury duty were diverted away from circuit courts because of the priority given to the district court in Grand Rapids. Before October 1993, Kent County summoned individuals from the qualified list to appear for juries at district courts prior to assigning jurors for county circuit courts. As part of this priority assignment process, prospective jurors from Grand Rapids were solely designated for venire panels for the district court in Grand Rapids. It is undisputed in the record that Grand Rapids is the city with the largest African American population in the county. Indeed, although African Americans are approximately 18 percent of the total population of Grand Rapids, the African American population in Grand Rapids represents approximately 85 percent of the African American

> population in Kent County. Moreover, by statute, once an individual was assigned to a district court venire, he or she was not placed back on the qualified list for the circuit court because of a statutory exclusion for individuals who served on a jury in the previous twelve months. As a consequence of the assignment process, regardless of the number of African Americans assigned to district courts, fewer African Americans were available to serve as jurors for county circuit courts.

The Michigan Supreme Court holding that this system, which was abandoned after Petitioner's trial, had nothing to do with the underrepresentation, is unrealistic and unreasonable.

As the Court ruled in *People v. Hubbard*, 217 Mich. App. 459 (1996), implicitly overruled by the Michigan Supreme Court in *People v. Smith*, and involving a situation almost identical to this case:

> "A statistical analysis of the racial composition of the jury arrays for a forty-nine-week period beginning in July 1990 and ending in July 1991 indicated that African-Americans were significantly underrepresented in the venires during this period. Additionally, we can infer from testimonial evidence offered that this underrepresentation of African-Americans also was present in 1989.
>
> We conclude, on this record, that defendant established that the underrepresentation of African-Americans resulted from a systematic exclusion of significant duration and, therefore, that

defendant satisfied the third prong of the *Duren* test."

Petitioner claims that siphoning could not have resulted in systematic underrepresentation because the data for the months following the end of the practice suggest a continuing comparative disparity. However a thorough examination of the data indicates that the end of siphoning did not affect the system until several months after October 1993. During the six months post-siphoning, there was a disparity measurement of 13.9 percent as compared to the 18 percent disparity in the last six months of the term that included siphoning, and a 34 percent disparity in the month of Mr. Smith's trial. JA 102a. Further, the six month post-siphoning period in 1993 and 1994 do not contain significant spikes in the data, such as the 41.1 percent measure in December 1993 and the 43.5 percent measure in February 1994.

Duren does not require the defendant to show the precise mechanisms causing the underrepresentation.

D. Systemic Causes Of Underrepresentation Not Relied On By The Court Of Appeals.

The evidence from Court Administrator Kim Foster was that minimal efforts were made to follow up when mail proved undeliverable, and when, though delivered, it was not answered. When people on the jury list did not show up for court, the efforts were again minimal to get any of those people in, and often depended on using the phone. There was a 25% rate of people who either did not get the mailing, or who got it and did not respond. After Respondent Smith's jury year, some steps were taken to get some in, but those steps did not get much further than sending a second letter, or making a phone call. And,

of course, if the person has no phone, he or she does not get that call. And if the person has moved, he or she does not get that letter. And if the person simply distrusts the government, the court system will let that person drop out, because Kent County law enforcement will not take any role in enforcing any sort of court order to bring jurors to court for jury service or for show cause proceedings.

This 25% is almost completely excluded from jury service, even before we get to the numerous other systemic factors.

Mr. Foster explained that people could get off of jury duty without ever seeing a judge, just by claiming an excuse, such as no ride, no babysitter, etc. Mr. Metzger explained that the black population was far more likely to have no ride or no babysitter, based on statistics showing that blacks had far more single parents, far more poverty, far more renters, far more people moving, far fewer cars, and far fewer phones. That is before we even get to the attitude of distrust of government which is far more prevalent among blacks than whites, according to the uncontradicted testimony.

If someone is a single parent, that person is more likely to need a babysitter. If someone has no car, that person is more likely to need a ride. If a person moves, that person is far less likely to appear on the jury panel. If a person has no phone, that person is far less likely to receive a call from the court administrator.

Petitioner claims that states have an interest in excusals for hardship. (Pet. Br. 52-57). That is true, but that was the same interest advanced by the state in *Duren*, and did not serve as a bar to relief.

Moreover, is "I can't get a ride" hardship? Is simply not showing up, and being allowed to, hardship?

As Mr. Metzger testified, the introduction of excuses into the system introduces a non-random element, one that tends toward underrepresentation of blacks. That the excuses are handled without any record being kept increases the arbitrariness.

It was error for the Michigan Supreme Court to conclude that the testimony of the witnesses did not show the reasons for the underrepresentation, and base its ruling on that. This is the best evidence available, because the Circuit Court failed to keep records of their ad hoc decisions that affected the composition of the jury pool. It would be a bizarre result to hold that the failure of the Court to keep records of the changes court personnel made in the jury pool would insulate the underrepresentation of a distinctive racial group from review. And, the statistics and expert testimony show that because excuses were a non-random element based on factors that applied to African-Americans more than whites, the ad hoc excuse system, unaccompanied by any compensating actions, would predictably lead to underrepresentation of blacks, and the statistics proved that the predictable did in fact occur.

As Mr. Foster testified, they knew that many people would use excuses to get out of jury duty, so they took steps to alleviate the court's problem of not enough jurors. They called more people than needed, so after excuses were done, there would still be enough left. (EHT I, 41; JA 621). Yet, they took no steps at all to alleviate the court's other problem, that is, that there not only be enough jurors, but that there be enough African-American jurors to make a fair cross-section of the community. The problem was well-known and well-identified, but the only portion

of the problem that the court administrator chose to solve was that portion of the problem that caused inconvenience to judges: the problem of not enough jurors. The remaining portions of the problem evidently were not considered important enough to do anything about.

One month after Mr. Smith's September 1993 trial, the County altered its selection process, giving the circuit court priority in selecting jurors from the countywide jury pool. JA 20a. The Circuit Court Administrator noted that this change allowed the circuit court to access a "larger representation of the community to select [jurors] from," thus remedying the "problem" of African-American underrepresentation. *Id.* at 22a.

This is another demonstration of the "systematic" nature of the problem. If changes in the system can cure the problem, that identifies the system as where the problem lies. As counsel argued to the court (EHT II, 56; JA 512):

> "say you have an electrical outage at your house, through part of your house, and you replace this wire and nothing happens, you replace that wire and nothing happens, but finally you replace this fuse and the lights come on. The fact that this worked tends to show you that you've found where the problem lies.
>
> And, in this case, the problem lies in not taking certain steps to overcome the non-random elements that are introduced into the pie as a result of a variety of reasons that were identified by Kurt Metzger.

> So I think that we also have the fact that in this period of September of 93, it was when they were still sending the jurors first to District Court, and only then to Circuit Court, just like in Kalamazoo, and numerically we have a very high under-representation of 34 percent."

In the case of Mr. Smith, his month showed underrepresentation of blacks that was over twice the already-excessive level of underrepresentation for the entire 17 month period.

In the case of Mr. Smith, we also have the fact that his jury was selected in the last month of the jury year. As counsel argued to the court (EHT II. 52-53; JA 511-512):

> "We have also the fact that these lists are made a year in advance. Therefore, as you start to get towards the end of the year, such as September of 93, where Mr. Smith's case lies, what you find is that if the people have moved away during that year, or moved to another place within the county, then they are not going to be found and they are not going to appear in the jury box.
>
> So the effect of having more black people moving from residence to residence is somewhat small in the early months of the year, of the jury year, but as you get further and further towards the end of the year, what you find is that a greater and greater proportion of black citizens are no longer available to get into the jury box, because more of them have moved from their original residences."

Here, we have a county that month after month after month had severe underrepresentation of blacks on the jury, yet claims that the system had nothing to do with it. We submit it is the duty of the system to take steps to cure this consistent pattern of underrepresentation. It is not adequate for the officials to say they can do nothing because it is not their fault blacks have fewer cars, fewer phones, and more single parent families. The past failure to compensate for these problems was a failure of the system. Defendants in Kent County should not have to wait until blacks gain economic parity with whites in order to get judicial parity with whites.

The system used in Kent County gave these results. A different system would give different results. The underrepresentation is necessarily systematic where it is produced by the system used.

The excusing of people who claimed a lack of a car was part of the system. The excusing of people who claimed need for a babysitter was part of the system. The failure to require proof of excuse was part of the system. The excusing of people who simply failed to show up was part of the system. The reliance on mail was part of the system. The failure to follow up on nonresponses was part of the system. The irregular nature of the follow-ups that did take place (there was some follow-up in some cases, sometimes by phone, but no record was kept of the follow-ups or how the candidates for follow-up were selected) was part of the system. The failure to follow up on no-shows was part of the system. The use of a jury list using residences at least 15 months old (in the case of Respondent Smith, in the last month of the jury year) was part of the system. The diversion of jurors to District Court juries was part of the system.

The refusal of deputies to enforce any court orders for jurors to appear for service or show cause proceedings was part of the system. This police decision just happens to coincide with their institutional interest in having more defendants convicted. It was unreasonable for the Michigan Supreme Court to find that the police decisions were not a part of the system that made a difference to the number of African-Americans appearing on Kent County juries. Moreover, the inaction of the courts in allowing the police to reign supreme over the courts in this area was part of the system.

Under the reasoning of the Michigan Supreme Court, if jurors are notified to appear only by e-mail, and if African-Americans have less e-mail access than whites, this would prove nothing, because, 463 Mich. at 206 "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." Such analysis would ignore the (hypothetical) decision of the Circuit Court employees to depend on e-mail where African-Americans have less of it.

The reason for underrepresentation of blacks on Kent County juries is not that African-Americans have fewer cars or fewer phones or more single-parent families. The reason for the underrepresentation is that the system adopted by Kent County is such that those factors make a difference.

V. THE AEDPA DOES NOT REQUIRE THE FEDERAL COURTS TO REFRAIN FROM ENFORCING *DUREN*.

Petitioner's claims that the AEDPA somehow blocks Habeas Corpus review in this case is unfounded. As this Court ruled in *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007), "AEDPA does not

'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" The three factor test of *Duren* is sufficiently clear to be enforced.

In *Terry Williams v. Taylor*, 529 U.S. 362 (2000), the Court ruled:

> "The simplest and first definition of "contrary to" as a phrase is "in conflict with." Webster's Ninth New Collegiate Dictionary 285 (1983).
>
> In this sense, we think the phrase surely capacious enough to include a finding that the state-court "decision" is simply "erroneous" or wrong.
>
> . . . .
>
> In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody--or, as in this case, his sentence of death--violates the Constitution, that independent judgment should prevail."

This Court's treatment of the test in *Strickland v. Washington*, 466 U.S. 668 (1984) for evaluating the effective assistance of counsel is instructive. 466 U.S. 668 (1984). *Strickland* requires a defendant who is challenging his counsel's effectiveness to demonstrate, *inter alia*, that the attorney rendered "deficient performance." *Id.* at 687. "To establish

deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Thus, *Strickland*'s "deficient performance" requirement is akin to *Duren*'s "representation" requirement in that both mandate an evaluation of disparity or deviation from a constitutional standard and use "reasonableness" as the guide for assessing the significance of the disparity or deviation.

Notwithstanding the fact that this Court has never "articulate[d] specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688), this Court has determined that *Strickland* "provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims" under AEDPA. *Williams*, 529 U.S. at 391. This is undoubtedly due to the fact that reasonableness is a "common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Williams*, 529 U.S. at 410 (O'Connor, J., concurring). The fact that the "*Strickland* test 'of necessity requires a case-by-case examination of the evidence' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams*, 529 U.S. at 391 (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring)); *see also Wiggins*, 539 U.S. at 522 ("In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S. at 688, which includes a context-

dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* at 689).

The same conclusion follows here. *Duren*'s "fair and reasonable" standard for assessing the appropriateness of venire representation is as clear and specific as the *Strickland* "reasonableness" standard. Both constitute clearly established United States Supreme Court law that must be cogently interpreted by the state courts.

AEDPA calls for de novo review of mixed questions of law and fact, which this type of claim was expressly held to be in *United States v. Allen*, 160 F.3d 1096 (6th Cir. 1998):

> "Whether a defendant has been denied his right to a jury selected from a fair cross-section of the community is a mixed question of law and fact, which we review *de novo*. *United States v. Miller*, 771 F.2d 1219, 1227 (9th Cir.1985); *see also United States v. Grisham*, 63 F.3d 1074, 1077 (11th Cir.1995) (constitutional challenges to jury selection process reviewed *de novo*); *Polk v. Hunt*, 76 F.3d 379, 1996 WL 47110, at *1 (6th Cir.1996) (unpublished)."

As the United States Supreme Court noted in *Lilly v. Virginia*, 527 U.S. 116, (1999):

> ". . . we have assumed, as with other fact-intensive, mixed questions of constitutional law, that "[i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles" governing the factual circumstances necessary to satisfy the protections of the Bill of Rights. *Ornelas v.*

United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)."

"[D]eference [under AEDPA] does not imply abandonment or abdication of judicial review . . . [and] does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Rather, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts."

CONCLUSION

This Court should dismiss the writ of certiorari as improvidently granted and wait for the zip code cases to arrive. If that is not done, then this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

JAMES STERLING LAWRENCE
Counsel of Record
828 W. Eleven Mile Road
Royal Oak, MI 48067
(248) 399-6930

Counsel for Respondent

December 18, 2009

REPLY BRIEF

No. 08-1402

In The
Supreme Court of the United States

MARY BERGHUIS
Petitioner,

v.

DIAPOLIS SMITH
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Timothy K. McMorrow
Appellate Chief
Kent County Prosecutor's Office

Attorneys for Petitioner

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INTRODUCTION

The Michigan Supreme Court did not unreasonably apply clearly established precedent in applying the fair-cross-section test of *Duren*. The disparities at issue – a 1.28% absolute disparity or an 18% comparative disparity – are not constitutionally significant. Even if measured as a 34% comparative disparity, no other federal court in habeas corpus or on direct review has found such a disparity to violate *Duren* where the absolute disparity was so small. In allowing for excuses for hardships and in allowing local courts to select their jurors first, there was no systematic exclusion. *Duren* does not require the conclusion that any underrepresentation that arose was inherent in the juror-selection process.

Smith's claim that the small disparities at issue from these neutral processes would violate the Constitution calls into question scores of decisions by the lower courts around the country. These courts concluded that similar small disparities did not qualify as unconstitutional underrepresentation or determined that the mechanism used by the government was facially neutral and that the underrepresentation arose from the independent actions of the citizens. A decision that requires the State to counter any persistent small disparity would effectively mandate the identification by race and ethnicity of prospective jurors, and then the matching of their relevant percentages. It would impose a *de facto* quota system.

In this reply brief, the State will address in order the arguments raised in Smith's brief.

First, Smith contends that the question whether there was underrepresentation is not "genuinely material" to this case because, he asserts, the Michigan Supreme Court issued no holding that there was no underrepresentation. Smith's Brief, p. 17. The Michigan Supreme Court effectively provided an alternative analysis – it specifically addressed the merits of the issue and ruled that there was no unconstitutional underrepresentation. But this Court must still decide this question even if the State court did not rely on this basis. The federal courts would still have to determine whether Smith was being held in violation of his constitutional rights. The analysis would be de novo on the merits if there was no ruling.

Second, in his next two headings, Smith argues that the absolute-disparity test does not validly measure the underrepresentation of small distinct groups, and argues in favor of the comparative-disparity test. But Smith fails to acknowledge that the comparative-disparity test exaggerates the significance of disparities for small distinct groups. And the comparative-disparity test does not address the fact that small absolute disparities – as here – will not likely affect the petit jury if the petit jury is selected at random. The Michigan Supreme Court was not unreasonable in rejecting the claim. In fact, even if reviewed de novo on its merits, the jury pool was adequately representative of the community to protect Smith's right to a fair jury trial. The jury pool was not composed of only special segments of the community.

Third, Smith asserts that a system that produces persistent underrepresentation or one that results in disparities without correcting for the social

and economic reasons that underlie the reasons for the underrepresentation is a system that has systematically excluded the distinct group. *Duren* does not require this conclusion. Rather, the federal courts have rejected this approach on direct review because it suggests that the federal reliance on voter registration lists for selecting prospective jurors might be constitutionally infirm if it results in disparities. Such neutral systems are not improper. The Michigan Supreme Court did not unreasonably apply *Duren*. Moreover, any underrepresentation that resulted from the juror assignment to the local courts first was constitutionally insignificant (3% comparative). Smith has not rebutted this point.

Fourth, Smith claims that in habeas corpus review the federal courts may review de novo the question whether the jury was drawn from a fair cross section under the Sixth Amendment. This is not the standard. Instead, the State court decision must be contrary to or an unreasonable application of clearly established Supreme Court precedent. Smith mistakenly cites the concurring part of Justice Stevens's opinion in *Williams v. Taylor*. Smith's Brief, p. 55. But Justice O'Connor's analysis that a petitioner must establish that the State decision was more than just incorrect, that it must be objectively erroneous in order to merit relief is the controlling law from this Court.

ARGUMENT

I. This Court should resolve the question whether there was an unconstitutional underrepresentation under the second prong of *Duren*.

Smith contends that the Michigan Supreme Court did not issue a holding on whether there was an unconstitutional underrepresentation of a distinct group here and therefore this issue is not "genuinely material" to this case. See Smith's Brief, p. 17. Although the State contends that the Michigan Supreme Court *did* rule on the second prong of *Duren* and that this decision is entitled to deference under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, even if this Court disagrees, the question whether Smith has satisfied the second prong of *Duren* is still at issue.

The petitioner has the burden of establishing a constitutional violation. Under 28 U.S.C. § 2254(a), a federal court may entertain a claim that a person is held in custody pursuant to a State court judgment on the ground that he is being held "in violation of the Constitution or laws or treaties of the United States." The burden is on the person in custody to demonstrate that he is entitled to habeas relief.[1]

In adopting a three-part test for the fair-cross-section standard, this Court noted that it was the defendant's burden to prove each of the three elements.[2] The defendant must prove each of the

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[1] *See Engle v. Isaac*, 456 U.S. 107, 134-135 (1982).

[2] *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

elements in order to warrant relief. In a habeas corpus proceeding, where there is no decision from the State court on one of the elements of a test, the federal court is able to review that element of the test de novo on the merits without the intervening AEDPA standard of deference.[3]

The issue at stake regarding whether the Michigan Supreme Court ruled against Smith under the second prong of *Duren* is therefore only one of deference. If the Michigan Supreme Court ruled on the merits that there was no unconstitutional underrepresentation, then this decision is entitled to AEDPA deference under 28 U.S.C. § 2254(d). Smith would have to show that the State court decision was either contrary to or an unreasonable application of clearly established Supreme Court precedent. Otherwise, the question whether there was a violation of the second prong of *Duren* is a question that Smith must prove de novo on the merits to show that he is entitled to habeas relief.

Smith also suggests that the comment by the State's counsel at oral argument in the Sixth Circuit supports his contention. The Sixth Circuit did not, however, rely on any concession by the State in its decision and therefore this comment was legally irrelevant. The reliance on spontaneous comments of

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[3] *See Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.").

counsel at oral argument is disfavored by this Court in any event.[4]

In claiming that the Michigan Supreme Court issued no holding on the second prong, Smith argues that this case is not an "appropriate vehicle" to adopt a new test for measuring underrepresentation. Smith's Brief, p. 18. This argument misapprehends the nature of review in habeas corpus cases. If the Michigan Supreme Court's ruling on the second prong that there was no violation of *Duren* is entitled to deference under AEDPA, it would be unnecessary for this Court to further develop the standards of the fair-cross-section test. This Court could reverse the Sixth Circuit without further developing the law in this area. Ironically, if this Court accepts Smith's claim that there was no merits decision, the issue regarding the standard for measuring underrepresentation would then be squarely presented on the merits (unless the Court relied on the third prong of *Duren* in rejecting the Sixth Circuit decision).

Moreover, regarding the State court decision, Smith's contention that the Michigan Supreme Court did not rule against him on the second prong of *Duren* fails to recognize that this was effectively an alternative holding. The point is an unremarkable one that a State court decision would be entitled to deference on each of the grounds on which it based its decision. Smith relies on the fact that the Michigan Supreme Court indicated that it would give Smith "the

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[4] *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972) ("We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument.")

benefit of the doubt on underrepresentation."[5] But the Michigan Supreme Court made clear it did so only in order to reach the third prong and provide guidance to the bench and bar on that issue:

> [D]efendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests. Nevertheless, rather than leaving the possibility of systematic exclusion unreviewed solely on the basis of defendant's failure to establish underrepresentation, we give the benefit of the doubt on underrepresentation and proceed to the third prong of the *Duren* analysis.[6]

In substance, this is an alternative holding.

Indeed, even the amicus curiae NAACP Legal Defense & Educational Fund in support of Smith agrees with the State on this point:

> Although this ruling is not a model of clarity, AEDPA controls here because the Michigan Supreme Court held that Mr. Smith failed to meet his prima facie burden under *Duren*'s second prong.
>
> [Amicus Brief for NAACP Legal Defense & Educational Fund, p. 25.]

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[5] *People v. Smith*, 463 Mich. 199; 615 N.W.2d 1, 3 (2000); Pet. App. 147a.

[6] *People v. Smith*, 615 N.W.2d at 3 (footnote omitted); Pet. App. 146a-147a.

This is the proper conclusion, particularly where the Michigan Supreme Court reiterated the same legal point in rejecting Smith's claim based on statistics under the third prong of *Duren*.[7] The point was not obiter dictum.

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[7] See *People v. Smith*, 615 N.W.2d at 4 ("Here . . . the disparities over that time fell far short of those in *Duren*. Defendant did not demonstrate unfair and unreasonable underrepresentation under the disparity analyses. We therefore conclude that defendant has not shown a systematic exclusion of African Americans for the Kent County Circuit Court jury pool."); Pet. App. 148a-149a.

II. The Michigan Supreme Court's ruling that there was no constitutionally significant underrepresentation of African Americans in the Kent County venires was not unreasonable.

In addressing the second prong of *Duren* in the second and third headings of his merits brief, Smith effectively provided a de novo merits analysis of the question and only in passing refers to the Michigan Supreme Court's decision as "unreasonable." Smith's Brief, p. 31. Smith does not contest the fact that all of the other federal circuits that have addressed a similar disparity have concluded that there is no unconstitutional underrepresentation. See State of Michigan's Merits Brief, Table on pp. 32-33.[8] The point bears repeating that the Michigan Supreme Court's decision was not an unreasonable application of clearly established Supreme Court precedent on the second prong of *Duren* as evidenced by the fact that seven federal circuits rejected the same argument on direct review in examining similar statistical claims.

A. The Michigan Supreme Court's decision was not unreasonable.

As Smith's amici acknowledge, "[t]his Court has never required a single or exclusive method for evaluating a fair-cross-section claim," and the "[l]ower federal and state courts have adopted a range of statistical methods[.]" Amicus Brief, Social Scientists *et al*, p. 9. Also, this Court has not clearly established what results constitute

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[8] The State has reproduced this table as an attachment to this reply brief for the convenience of the Court. See p. 1A.

underrepresentation under these different methods. Accordingly, the Michigan Supreme Court's conclusion that a jury pool with a 1.28% absolute disparity and 18% comparative disparity was not unconstitutional underrepresentation did not unreasonably apply clearly established Supreme Court law.

Smith's analysis provides no guidance on what threshold would constitute a violation under either the absolute-disparity test or the comparative-disparity test. The disparity at issue here was 1.28% absolute and 18% comparative for the six-month time period in which the challenged-selection process was measured. J.A. 181a. For the specific month in which the jury trial was held, the comparative disparity was 34.8%, J.A. 181a; and, as noted by the amicus for the Social Scientists *et al*, the absolute disparity for the specific month at issue was 2.5%. See Amicus for Social Scientists *et al*, p. 13.[9]

If these kinds of small disparities are sufficient to establish a prima facie violation of the second prong of *Duren*, this conclusion calls into question the validity of precedent from the federal circuits that examined similar questions on direct review. Among the scores of cases that address the fair-cross-section test under the Sixth Amendment in the lower courts, Smith and the amici cannot cite to a single case with a similar absolute disparity or comparative disparity that served as a basis for a finding that there was a

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[9] The absolute disparity for this month is calculated by subtracting the percentage that Michael Stoline projected were present, 4.75% (7.5 African American projected jurors divided by 158 prospective jurors), from the percentage in the relevant population, 7.28%. See J.A. 121a, 181a.

prima facie showing of unconstitutional underrepresentation.[10] The argument that this Court should adopt a "case-by-case" approach relying on both the absolute disparity and comparative disparity test, see Smith's Brief, p. 26, does not address the issue about what is a "fair and reasonable" representation of the community under *Duren*. The Michigan Supreme Court did as Smith suggests here, ruling "we adopt a case-by-case approach" noting each of the three methods of measuring representation.[11]

In specifically arguing that the Michigan Supreme Court was unreasonable in its application of *Duren*, the amicus for the NAACP Legal Defense & Educational Fund argues that the State court should have recognized that it was unreasonable to apply the absolute-disparity test in evaluating a small distinct group. See NAACP Amicus, p. 26. But *Duren* did not specify a particular measure, nor is it clear that the absolute-disparity test is valueless for measuring disparities for small distinct groups. All the circuits evaluating similar disparities for distinct groups on direct review considered the absolute-disparity test

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[10] In this case, the Sixth Circuit relied on *United States v. Rogers*, 73 F.3d 774 (8th Cir. 1996) and *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992). *Smith v. Berghuis*, 543 F.3d 326, 338 (6th Cir. 2008); Pet. App. 21a. But these cases cited by the Sixth Circuit did not support its conclusion. *Rogers* held that there was no constitutional underrepresentation. See State's Merits Brief, p. 38. *Ramseur* also found there to be no unconstitutional underrepresentation. *Ramseur*, 983 F.3d at 1232, 1235 (the Third Circuit noted while a 40% comparative disparity was "borderline," the court concluded that "the evidence does not convincingly demonstrate that the representation of African-Americans on jury pools was unfair or unreasonable.").

[11] *People v. Smith*, 615 N.W.2d at 8; Pet. App. 146a

even if acknowledging its limitations. See Attachment, p. 1A; State's Merits Brief, Table, pp. 32-33. Examining the actions of the federal courts is useful in evaluating the reasonableness of the State's decision.[12] They show that the Michigan Supreme Court's reliance on this test was not unreasonable here.

The NAACP amicus brief also argues that the Michigan Supreme Court was unreasonable for concluding that a 34.8% comparative disparity was not an unconstitutional underrepresentation. Like Smith, the NAACP amicus brief does not explain why under *Duren* it is proper to single out a single month's figure for evaluation. This Court did not examine only a single month in *Duren*. And, as already noted, there is nothing in *Duren* that would make clear that a 34.8% comparative disparity would be sufficient to establish a prima facie case.[13] All the circuits have found such a disparity to be inadequate on direct review. See Attachment, p. 1A; State's Merits Brief, Table, pp. 32-33.

B. Even if reviewed on the merits, the venire here was adequately representative of the community.

Smith does not address the State's point that this Court need not adopt either the absolute disparity test, or the threshold of a 10% disparity, in order for the State to prevail. This is true whether the issue is reviewed under AEDPA or de novo on the merits. The prospective juror pool here was adequately representative of the community to safeguard the

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[12] *See Price v. Vincent*, 538 U.S. 634, 645 (2003).

[13] The comparative disparity in *Duren* was 73%

purposes of the Sixth Amendment fair-cross section test. The mechanisms used by Kent County to draw in prospective jurors were neutral, did not result in significant disparities, and did not systematically exclude any distinct groups. There was nothing contrived or exclusive about the composition of the venires in Kent County during the time at issue.

The State has nonetheless urged this Court to adopt the absolute-disparity test and the 10% threshold in order to provide guidance to the bench and bar for future cases in habeas, or if this Court reviews the merits of the issue de novo.

The virtue of the absolute-disparity test is that it uniformly measures the disparity at issue for the distinct group, regardless of the size of the distinct group. Thus, the absolute-disparity test is better suited for Sixth Amendment analysis by serving the purposes of the Sixth Amendment fair-cross-section test. As noted by this Court in *Holland v. Illinois*, the traditional understanding of a fair jury is that it is assembled from a venire that is "'drawn from a fair cross section of the community[.]'"[14] The right to an impartial jury must be protected from the government contriving an unrepresentative venire from which the petit jury is selected:

> The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not

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[14] *Holland v. Illinois*, 493 U.S. 474, 480 (1990), quoting *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

> demand), but an impartial one (which it does). Without that requirement, *the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition.*[15]

In brief, the fair-cross-section requirement ensures that the pool from which the petit jury is selected is not unfairly prejudiced against the defendant.

The representative character of the venire, of course, relates to the ultimate selection of the petit jury. This is the apparent reason that this Court limited the fair-cross-section test to "large, distinct groups" in *Taylor v. Louisiana*,[16] because discrepancies for small distinct groups in the venire will not necessarily affect the actual composition of the petit jury as a matter of probability. The core Sixth Amendment value is the impartiality of the petit jury.

In this way, the absolute-disparity test is the proper measure for the representativeness of the venires because it uniformly captures information about the likelihood of a disparity affecting the actual composition of the petit jury. Assuming a random draw

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[15] *Holland*, 493 U.S. 480-481 (emphasis added). *See also Taylor*, 419 U.S. at 530 ("This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace[.]"

[16] *Taylor*, 419 U.S. at 530. *See also Ballew v. Georgia*, 435 U.S. 223, 237 (1978) ("the opportunity for meaningful and appropriate representation does decrease with the size of the [petit jury] panels.").

of jurors for the petit jury, a 10% absolute disparity of a distinct group for a venire will mean that there is a 10% reduction in the members of that distinct group from the venire regardless of the size of the distinct group. Thus, it closely correlates to the likelihood that the disparity will affect the actual composition of the petit jury. By contrast, the comparative-disparity test only measures the likelihood that a distinct group will appear in the venire, and this percentage may bear little relationship to the likelihood that the distinct group will serve on the petit jury.

Smith did not effectively rebut the point that the comparative-disparity test exaggerates the effect of small disparities. In measuring the relative change for the particular distinct group, the comparative-disparity does not capture the likelihood that this change would affect the petit jury. As a consequence, it amplifies the significance of small variations for small distinct groups. For example, Smith's statistical expert, Michael Stoline, concluded here that there were four African Americans too few for the month's worth of prospective jurors, 7.5 as against 11.5 for the 158 prospective jurors. J.A. 121a, 181a. This small change yielded a 34.8% comparative disparity.

If this Court accepted 35% comparative disparity as the benchmark for a prima facie violation of the second prong of *Duren* for any particular month, then small variations would subject the State to fair-cross-section challenges. In specific, according to the 1990 census figures cited in this case, Kent County was comprised of 2.9% Latino-Americans, 1.1% Asian-Americans, and 0.6% Native Americans. Sixth Circuit Joint Appendix, p. 177 (1990 Census). And the State of

Michigan under Mich. Comp. Law § 600.1307a(b), like the United States Government under 28 U.S.C. § 1865(b)(2), (3), excludes from service those citizens who cannot understand or speak English. A single member of a distinct group who is excluded on this basis could trigger a violation. Relying on 158 prospective jurors for the month of trial, one would expect 4.6 Latino American, 1.7 Asian American, and 0.9 Native American prospective jurors. A reduction by two Latinos, one Asian American, or one Native American would constitute more than a 35% comparative disparity. Such a standard is unworkable.

The adoption of the standards being advanced by Smith and the amici would require the State of Michigan and all of its counties to fundamentally alter the way they select jurors to comply with this understanding of the fair-cross-section test. Each county would have to document the race, ethnicity, and sex of all of its prospective jurors and then ensure that the actual venires drawn correspond to the census figures for the distinct populations as modified to reflect the jury-eligible population. This would effectively eliminate or require the substantial modification of each step in the current process:

1. Select prospective juror names from the State's reliance on driver's licenses and State identifications; [J.A. 10a-11a]

2. Send out questionnaire to the prospective jurors by regular mail; [J.A. 12a, 29a]

3. Send second letter to the addresses for which it received no response; [J.A. 13a, 14a]

4. Eliminate the responses that claimed a statutory exemption, including an inability to understand English; [J.A. 15a] and

5. Send summons with a second questionnaire requesting personal history and allowing for excuses based on hardship. [J.A. 17a, 21a]

At each step, the neutral process might disparately affect small distinct groups differently, affecting by a few the numbers of prospective jurors drawn in. As a consequence, the State would be required to use a race-conscious method to identify the race and ethnicity of those qualified prospective jurors and ensure an identical representation of each distinct group, however small, to avoid a constitutional challenge.[17] The State of Georgia has adopted a similar system to this, terming it one of "forced balancing."[18] This Court

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[17] This process, of course, would have to comport with the Equal Protection Clause. The Sixth Circuit rejected as discriminatory against Latino Americans a plan in which the Eastern District of Michigan culled out one out of every five non-African Americans from the qualified jury wheel because of the underrepresentation of African Americans. *United States v. Ovalle*, 136 F.3d 1092, 1107 (6th Cir. 1998).

[18] *Ramirez v. State*, 276 Ga. 158, 575 S.E.2d 462, 465 (2003). *See also* 6 W. LaFave, J. Israel, N. King & O. Kerr, Criminal Procedure, § 22.2(d), (3d 2007) ("[C]ounty officials in Georgia use census data to set quotas for various cognizable groups based on

did not require this process in *Duren*. This is precisely the reason why this Court has prudently limited the fair-cross-section requirement to "large" distinct groups.[19] Such small disparities do not call into question the impartiality of the venire and do not implicate the interest of safeguarding a defendant's right to a fair trial.

C. Establishing 10% as a threshold under the absolute-disparity test for proving a violation under the second prong of Duren *would constitute a reasonable rule.*

Regarding the State's position that this Court should establish a threshold of 10% absolute disparity before a party can establish a prima facie showing of underrepresentation under *Duren*, the three arguments advanced by the State in its initial brief remain valid.

First, Smith and the amici have not cited a single case in which a lower court found a violation of the fair-cross-section requirement where the absolute

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race, age and gender, and then rely on a computer to randomly select members of the jury wheel from within each group.").

[19] *Taylor v. Louisiana*, 419 U.S. at 530.

disparity was less than 10%.[20] Thus, this standard reflects the reality of practice.[21]

Second, Smith and the amici concede that several circuits have relied on this measure. See State's Merits Brief, pp. 46-47 n. 66.[22]

Third, and most importantly, the standard corresponds to the core value of the Sixth Amendment, which is to protect the impartiality of the jury. Smith contends that the threshold will provide no remedies for absolute disparities for small distinct groups. But a defendant will still be able to bring challenges against these disparities based on the Equal Protection Clause.[23] Moreover, a small absolute disparity will not significantly affect the ultimate composition of the petit jury. This case is a perfect example of that point.

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[20] There are at least two cases in which this Court found a total exclusion of a distinct group that comprised less than 10% of the population to be a violation of the Equal Protection Clause. *See Vasquez v. Hillery*, 474 U.S. 254, 263-264, 267 n.2 (1986) (4.7%); *Norris v. Alabama*, 294 U.S. 587, 590, 599 (1935) (2688 persons in population of 36,881 or 7.2%). The total exclusion demonstrated an intentional exclusion of African Americans.

[21] *See* 6 LaFave *et al*, Criminal Procedure, § 22.2(d), p. 60 ("An absolute disparity of 10% . . . is typically sufficient to show underrepresentation.").

[22] In addition to the Fifth, Seventh, and Eleventh Circuits cited, the Eighth Circuit has also relied on this standard. *See United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981) ("This court has stated that in the absence of any evidence indicating an opportunity to discriminate in selection procedures, the 10% figure approved in [*Swain v. Alabama*, 380 U.S. 202 (1965)] is an appropriate standard for finding underrepresentation.").

[23] See n. 20 above.

A very small absolute disparity in the venire is not likely to affect the actual composition of the petit jury if the petit jury is randomly selected. That is true for the month at issue here. Smith's expert, Michael Stoline, explained that there were four fewer African Americans as projected from the census tract figures. J.A. 181a. This is a 2.5% absolute disparity. Applying these figures to Smith's specific venire of 60 prospective jurors (the number that the State trial court indicated it called, J.A. 7a), this was a loss of 1.5 jurors (60 multiplied by 0.0250). Since each prospective juror has only a one in five likelihood (20%) of being selected for the petit jury (60 prospective jurors for 12 slots), the loss of one or two jurors would not have likely affected the actual composition of the petit jury.

Of course, regardless whether this Court adopts the 10% threshold, a 1.28% absolute disparity would not satisfy the underrepresentation prong of *Duren*. The same is true if this Court adopts the comparative-disparity test. There was no violation here.

As long as the methods of selecting the venire were neutral and reasonable – as they were here – the fact that there are small disparities does not show that the venire has been contrived with "special segments"[24] or of prospective jurors "ill disposed" to defendants.[25] Smith was not deprived of an impartial jury.

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[24] *Taylor v. Louisiana*, 419 U.S. at 530.

[25] *Holland v. Illinois*, 493 U.S. at 480

III. The Michigan Supreme Court ruling that there was no systematic exclusion of African Americans was not unreasonable.

In Smith's brief, his primary claim is that the standard for determining whether there is "systematic exclusion" of a distinct group under *Duren* should be either that the underrepresentation occurs regularly ("persistent") or that the underrepresentation is produced by the system used to select prospective jurors. Smith's Brief, pp. 38-46. The primary flaw of this argument is that it does not acknowledge the limited nature of the review in habeas. This Court may only grant relief if the Michigan Supreme Court decision was an unreasonable application of clearly established Supreme Court precedent under 28 U.S.C. § 2254(d). *Duren* did not require the definitions of systematic exclusion advanced here.

Rather, the standard of law for establishing systematic exclusion in *Duren* was that the underrepresentation must be "inherent in the particular jury-selection process utilized."[26] And the fact that the process included a categorical distinction, treating women different from men, was integral to this Court's analysis.

This Court noted that the underrepresentation occurred "not just occasionally" but in nearly every week for a year.[27] But this Court then explained that the defendant there demonstrated that the underrepresentation was "due to the operation of

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[26] *Duren*, 439 U.S. at 366

[27] *Duren*, 439 U.S. at 366

Missouri's exemption criteria" after evaluating the discrepancies at the different stages of the process.[28] It was essential to this Court's analysis that the defendant demonstrated that the "automatic exemption for women"[29] – which is a categorical distinction – caused the underrepresentation. This Court has made it clear that it is the holdings of this Court that bind the State courts in habeas.[30]

In brief, *Duren* did not hold that a jury system that yields consistent underrepresentation is sufficient to establish a prima facie case of systematic exclusion. This conclusion is supported by the analysis of the federal courts on direct review in examining whether the federal government's reliance on voter registration lists violated the fair-cross-section test. The lower courts have, apparently without exception, rejected the claim that underrepresentation that is produced by use of voter registration lists is "systematic exclusion." See State's Merit's Brief, p. 55 n. 76. The analysis is predicated on the point that citizens who decide not to register to vote have effectively removed themselves from the jury process and any disparity that arises does not inhere in the selection process:

> Not only has the use of the voter registration lists been uniformly approved by the Court of Appeals as the basic source for the jury selection process and will not be invalidated because a

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[28] *Duren*, 439 U.S. at 367

[29] *Duren*, 439 U.S. at 367

[30] *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., speaking for a majority of the Court).

> group chooses not to avail itself of the right to register without any discrimination of any kind, but Congress specifically approved the use of such lists even though it was recognized that persons who chose not to register would be excluded from the jury selection process.[31]

The circuits have likewise reasoned that the failure to follow up on the undelivered questionnaires or failure to update mail addresses does not represent systematic exclusion that inheres in the jury-selection process.[32]

These decisions provide support for the point that the rule advocated by Smith is not currently required by the *Duren* decision. This Court has recognized that the decisions of the federal circuits on direct review are evidence to determine whether a State court's decision was reasonable in reaching the same result in applying the same law.[33]

The claims of systematic exclusion in the registration cases are analogous to the claims here. The Sixth Circuit determined that the allowance by Kent County for excuses for hardship based on child care, transportation, and work considerations constituted systematic exclusion because these factors "disproportionately impact[ed]" African Americans.[34]

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[31] *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir. 1988)(en banc).

[32] *See, e.g., United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006).

[33] *See Price*, 538 U.S. at 643.

[34] *Smith v. Berghuis*, 543 F.3d at 342; Pet. App. 29a.

The Sixth Circuit also concluded that the assignment of jurors to the local courts was systematic exclusion.[36] Like the reliance on voter registration lists, the allowance for excuses based on hardship and assigning jurors to the local courts first are facially neutral mechanisms. And like the use of registration lists, the fact that distinct groups may be affected differently than other citizens is based on factors that are independent from the system itself of selecting the prospective jurors. Any disparate impact does not inhere in the system.

If anything, the claim that the underrepresentation inheres in the system is stronger against the use of voter registration lists than the allowance for hardships or assigning jurors to local courts first. The jury-selection process that establishes its initial base of prospective jurors from an unrepresentative pool should be more vulnerable than one that draws from a representative pool and creates fair, neutral mechanisms for service but that might affect distinct groups differently. But the federal courts have rejected the claims against the voter registration lists. The Michigan Supreme Court cannot be unreasonable in reaching the same conclusion in this case.

Smith also wrongly suggests that the State has the initial burden of proof of countering the cause of underrepresentation. Smith's Brief, p. 40 ("The second is that the state did not prove what caused the underrepresentation"). But *Duren* is clear that the burden of demonstrating the cause of the

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[36] *Smith v. Berghuis*, 543 F.3d at 542; Pet. App. 29a-30a.

underrepresentation is the defendant's in the first instance in order to establish a prima facie case.[36] This inadvertent shifting of the burden of proof is significant, particularly where there are other factors, including neutral statutory ones, which might explain any underrepresentation.[37]

The other primary flaw in Smith's argument is his failure to address the point that even accepting the claim that any underrepresentation caused by the assignment process was inherent in the system, Smith did not show that it caused any significant disparity. The comparative disparity from the 1993 jury term was 18% and for the 1994 jury term was 15%. It is unrebutted that this would be a 3% comparative disparity, or two prospective jurors out of 929 total prospective jurors over a six-month period of time. See State's Merits Brief, pp. 61-62. The Michigan Supreme Court cannot have been objectively unreasonable in rejecting a claim predicated on this showing.

Smith's assertion that "a thorough examination of the data indicates that the end of siphoning did not affect the system until several months after October 1993" (See Smith's Brief, p. 48) is unsupported by the record. There is no basis on which to believe that there would be any delay in the effect that it would yield once the jury assignment process was discontinued.

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[36] *Duren*, 439 U.S. at 364 (defendant must prove that "this underrepresentation is due to systematic exclusion").

[37] Michigan law excludes from service those who cannot understand English and, at the time of trial, those under sentence for a felony. Mich. Comp. Law § 600.1307a.

Finally, Smith lists nine different aspects of the jury-selection process in which he claims that it systematically excluded African Americans: (1) allowance for excuses; (2) failure to require proof for the excuse; (3) excusing those who failed to appear; (4) reliance on the use of mail; (5) failure to follow up on non-responses; (6) the irregularity of the follow up that did occur; (7) failure to follow up on no-shows; (8) use of 15-month old addresses; and (9) the assignment of the jurors to the local courts first. See Smith's Brief, p. 53. These processes were all neutral. These types of claims can be brought against virtually every jury-selection process. The point merely reaffirms the conclusion that if Smith's claim prevails, the only way to avoid a challenge will be to ensure that every venire matches identically the relevant jury-eligible percentages in the population. *Duren* does not require this.

IV. Contrary to his brief, Smith must demonstrate that the Michigan Supreme Court's decision was objectively unreasonable, not just that it was merely "incorrect."

In Smith's short section evaluating the AEDPA standards, Smith cites the wrong standard for evaluating habeas claims in two critical respects.

First, Smith cites *Williams v. Taylor*, quoting from Justice Stevens's analysis in section II of his opinion, suggesting that the Court may reject a State court decision if it merely disagrees with the decision. See Smith's Brief, p. 55. But this is not the right standard. The controlling law for AEDPA on reasonableness comes from Justice O'Connor's opinion in *Williams*, which noted that the State court decision cannot be merely "incorrect," but that it must also be objectively "unreasonable."[38] This proposition was joined by a majority of the Court in *Williams*. This rule has since been reiterated numerous times by this Court.[39]

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[38] *Williams*, 529 U.S. at 411 (O'Connor, J.) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.")

[39] *See, e.g., Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold"), *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("That is, 'the state court's decision must have been [not only] incorrect or erroneous [but] objectively unreasonable'"), quoting *Wiggins v. Smith*, 539 U.S. at 520-521 (internal quotation marks omitted).

Second, Smith asserts that AEDPA "calls for de novo review of mixed questions of law and fact" on this type of claim. See Smith's Brief, p. 57. Smith cites *United States v. Allen* in support of his position, which was a Sixth Circuit decision.[40] This is not the right standard. *Allen* was decided on direct review. Rather, the standard was articulated by this Court in Justice O'Connor's opinion in *Williams v. Taylor*. Justice O'Connor was evaluating the significance of "unreasonable application" from 28 U.S.C. § 2254(d)(1) in evaluating a mixed question of law and fact of ineffective assistance of counsel.

In that opinion, Justice O'Connor concluded for the Court that the application of clearly established Supreme Court precedent cannot be merely "incorrect" but must be "objectively unreasonable."[41] This opinion rejected – as an "erroneous interpretation"[42] – the position cited by Smith.

This is significant because the same error pervades the decision of the Sixth Circuit – the failure to determine whether the Michigan Supreme Court was objectively unreasonable in applying clearly established Supreme Court precedent. *Duren* did not require the decision here. Kent County did not systematically exclude African Americans from its jury pools. This Court should reverse.

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[40] *United States v. Allen*, 160 F.3d 1096, 1101 (6th Cir. 1998)

[41] *See Williams*, 529 U.S. at 409 ("Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.").

[42] *Williams*, 529 U.S. at 404

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Timothy K. McMorrow
Special Assistant
Attorney General
Appellate Chief
Kent County Prosecutor's
Office

Attorneys for Petitioner

Dated: January 2010

ATTACHMENT

TABLE

Circuit	Community	Jury Pool	Absolute Disparity	Comp. Disparity
1st	4.86%	1.89%	2.97%	[61%][43]
2d	7.08%	5.0%	2.08%	[29%]
	4.24%	2.10%	2.14%	[50%][44]
3d	3.07%	1.84%	1.23%	40.01%
	0.97%	0.26%	0.71%	72.98%[45]
7th	3%	0%	3%	[100%][46]
8th	1.87%	1.29%	0.579%	30.96%[47]
9th	3.87%	1.82%	2.05%	52.9%
	5.59%	2.79%	2.8%	50.0%[48]
10th	7.40%	4.78%	2.62%	35.41%
	4.21%	2.66%	1.55%	36.82%
	1.47%	0. 67%	0.80%	54.41%
	3.02%	1.36%	1.66%	54.97%[49]

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[43] *United States v. Royal*, 174 F.3d 1, 10 (1st Cir. 1999).

[44] *United States v. Rioux*, 97 F 3d 648, 657-658 (2d Cir. 1996).

[45] *United States v. Weaver*, 267 F.3d 231, 241, 243 (3d Cir. 2001)

[46] *United States v. Ashley*, 54 F.3d 311, 313-314 (7th Cir. 1995).

[47] *United States v. Rogers*, 73 F.3d 774, 776-777 (8th Cir. 1996) (finding no constitutional disparity for African Americans because the panel was constrained to follow prior precedent).

[48] *United States v. Sanchez-Lopez*, 879 F.2d 541, 547-549 (9th Cir. 1989).

[49] *United States v. Orange*, 447 F.3d 792, 798-799 (10th Cir. 2006).

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

v.

DIAPOLIS SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), THE NATIONAL URBAN LEAGUE, REPRESENTATIVE JOHN CONYERS, JR., MR. WAYNE J. BENTLEY, AND MR. RICHARD E. HILLARY IN SUPPORT OF RESPONDENT

MICHAEL B. DE LEEUW
Counsel of Record
CATHERINE MEZA
JOHNATHAN J. SMITH
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

Counsel for Amici Curiae

December 28, 2009

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a coalition of organizations and individuals that have united to ensure this Court considers the voices of jury-eligible African-Americans who are unlawfully excluded from jury venire panels. Although the central legal issue in this appeal involves a criminal defendant's Sixth Amendment right to a fair cross-section, the interpretation of that right has a clear and direct link to jurors' Fourteenth Amendment guarantee of equal protection under the law.

Amici include the Charles Hamilton Houston Institute for Race & Justice ("CHHIRJ"), the National Association for the Advancement of Colored People ("NAACP"), the National Urban League, Representative John Conyers, Jr. and individual prominent members of the community from Kent County, Michigan.

More detailed descriptions of the *amici* and their interest in this matter are contained *infra* in the Appendix.

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[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief. Letters of consent by the parties to the filing of this briefing have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The underrepresentation and unlawful exclusion of African-Americans from juries has been a systematic problem ever since the passage of the Fifteenth Amendment. *See e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880). Despite the tremendous progress that has been made, racial diversity within jury venire panels as well as on grand and petit juries is a goal that remains elusive in many jurisdictions throughout the United States. *See, e.g.*, Geri L. Dreling, *Churning Up the Jury Pool: Massachusetts Case Renews Debate About Minority Representation in Federal Juries*, 92 A.B.A.J. 12, 1 (Jan. 2006) (reporting that representation of racial minorities, particularly African-Americans, remains "a consistent problem" nationwide).

The underrepresentation of African-American and other minority groups from juries is problematic for a number of reasons. First, this Court has repeatedly recognized that such exclusion cannot be reconciled with fundamental, constitutional principles; specifically, it contravenes both the Sixth and Fourteenth Amendments. Second, jury service is one of the most meaningful activities through which citizens participate in our democracy; excluding African-Americans from that process is functionally equivalent to denying them full citizenship. And finally, recent social science research and legal scholarship establishes that racially diverse, heterogeneous juries are not only more likely to be effective in pursuing the jury's truth-seeking charge during the deliberation process, but they also increase the public's perception of legitimacy of the entire justice system.

Here, the record unequivocally establishes that the petit jury that heard and convicted the Respondent, Mr. Diapolis Smith, was selected from a jury venire panel that systematically excluded African-Americans. The Sixth Circuit's conclusion that Mr. Smith's Sixth Amendment right to an impartial jury drawn from a fair cross-section of his community was violated is not only consistent with this Court's clearly established Sixth Amendment jurisprudence, including *Duren v. Missouri*, 439 U.S. 357 (1979), but also with the rationale underlying a number of this Court's opinions that the systematic exclusion of African-Americans, or any other minority group, has no place in our democratic society.

ARGUMENT

I. THE SYSTEMATIC EXCLUSION OF AFRICAN-AMERICANS FROM JURY VENIRE PANELS INFLICTS GRAVE INJURIES ON THE EXCLUDED JURORS

Excluding African-Americans from jury venire panels not only violates those individuals' constitutional rights, but it also prevents them from participating in a fundamental aspect of American democratic life.

A. The Unlawful Exclusion of Jurors Violates Both the Fourteenth and Sixth Amendments

This Court has recognized that impermissibly denying individuals the right to participate in jury service on account of their race not only inflicts a constitutional harm on the litigants, *see Batson v.*

Kentucky, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."), but also on the excluded jurors. As this Court explained in *Carter v. Jury Commission of Greene County*:

> Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.

396 U.S. 320, 329 (1970); *see also Georgia v. McCollum*, 505 U.S. 42, 48 (1992) ("[D]enying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror."). Specifically, this Court has held that such exclusion cannot be reconciled with the Fourteenth Amendment's Equal Protection clause, writing:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he

> or she does possess the right not to be excluded from one on account of race.

Powers v. Ohio, 499 U.S. 400, 409 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) ("We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.").

Underlying this recognition of jurors' equal protection right is the understanding that such unlawful exclusion is anathema to true democratic society. This Court wrote in *Taylor v. Louisiana*: "To exclude racial groups from jury service. . .[is]. . . 'at war with out basic concepts of a democratic society and a representative government.'" 419 U.S. 522, 527 (1975) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). Indeed, as long ago as the Reconstruction Era, the Court in *Strauder* had no difficulty concluding a statue that denied African-Americans citizens the opportunity to serve as jurors could not pass constitutional muster. The Court explained:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which

> is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. at 308. The Court echoed this sound conclusion in *J.E.B. v. Alabama ex rel. T.B.*, which held that the Fourteenth Amendment forbids peremptory challenges to potential jurors based solely on gender. Justice Blackmun, writing for the majority, recognized:

> Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

511 U.S. at 146 n.19 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946)). And while in recent years most of this Court's jurisprudence regarding excluded jurors' Fourteenth Amendment rights has focused on situations involving the unlawful exclusion from particular petit juries, *see, e.g., Powers*, 499 U.S. at 402; *J.E.B.*, 511 U.S. at 128-29, the same analysis applies to the systematic exclusion of entire groups of people from jury venire panels. *See Carter*, 396 U.S. at 329-30 (concluding that the jury selection laws in Greene County, Alabama, which prevented fully qualified African-American citizens from ever being called for jury service, could not survive constitutional scrutiny).

This Court's Sixth Amendment cases also reflect the same constitutional concerns about the unlawful exclusion of jurors from venires based on "immutable characteristics," such as race and gender. In *Duren*, for example, this Court held that a Missouri state statute that exempted women from jury service violated the criminal defendants' right to a petit jury selected from a fair cross-section as guaranteed by the Sixth Amendment. 439 U.S. at 367. Along with a concern for the defendant's rights, both the majority opinion and Justice Rehnquist's dissenting opinion reveal the Court's parallel concerns for the harm to the constitutional rights of the excluded female jurors. *Id.* at 371 ("That the majority is in truth concerned with the equal protection rights of women to participate in the judicial process...."). A similar concern is present in the opinion in *Taylor*, which was also a Sixth Amendment challenge to the systematic exclusion of women from venires. *See* 419 U.S. at 537.

While the holdings in these cases are based on a constitutional principle separate and distinct from the Fourteenth Amendment's Equal Protection Clause—i.e., the Sixth Amendment's fair cross section guarantee—the Court's underlying reasoning is resoundingly similar: there is no justification whatsoever for excluding otherwise qualified potential jurors from jury venires because such exclusion cannot be harmonized with the federal constitution.

B. Excluding Jurors from Venire Panels Prevents Them from Participating in a Fundamental Aspect of American Civic Life

The constitutional harm to the otherwise qualified potential jurors' rights is amplified because it prevents them from engaging and participating in one of the most fundamental aspects of American democratic society.

The centrality of jury service to American civic engagement cannot be understated. In the early years of our country, as Alexis de Tocqueville eloquently put in his seminal treatise *Democracy in America*:

> The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge toward society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.

Alexis de Tocqueville, *Democracy in America* 364 (Henry Reeve & Francis Bowen trans., Sever & Francis 3rd ed. 1863). He went on to praise the values and skills jury service instills into the populace:

> The jury contributes most powerfully to form the judgment and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties . . . . I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

Id.

De Tocqueville was not alone in having such a high estimation of the value and benefit of jury service. Many of the Founding Fathers and early leaders of the nation also stressed the importance of serving on a jury. For example, Thomas Jefferson, while serving as ambassador to France in 1789, speculated that jury service may be of a greater value to building a true democracy than even the right to vote, writing: "Were I called upon to decide whether the people had best be omitted in the

Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making of them." *Letter from Thomas Jefferson to the Abbé Arnoux* (July 19, 1789), *reprinted in* 15 The Papers of Thomas Jefferson, 282, 283 (J. Boyd ed. 1958). Similarly, legal scholar Akhil Reed Amar's research into the history and ratification of the Bill of Rights found that juries and jury service could serve as the "paradigmatic image underlying the Bill of Rights" because it "summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence" of those first ten amendments. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1190 (1991). Amar's research revealed that the Framers valued jury service in part because it provided a platform to educate the citizenry:

> Like the church and the militia, the jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct. Churches stressed religious and moral virtues; militias struck a proper balance between civilian and martial virtues; and juries instilled republican legal and political virtues.

Id. at 1186.

This principle, that jury service is a necessary part of our political and civic community, has also been recognized by this Court:

> Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.

Carter, 396 U.S. at 330. Similarly, the Court explained in *Powers*: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life," and invoking de Tocqueville, quoted his observation that "the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society." 499 U.S. at 402, 407.

Moreover, recent empirical research on jury service and political engagement supports the view that jury participation inculcates civic virtue by inducing political participation. One study exploring the impact of jury deliberation on electoral participation found a connective cognitive and behavioral link between jury service and voting: those participants who engaged in jury deliberations were more likely to vote in subsequent elections. John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 The J. of Pol. 1, 9, 13 (2008). In fact, those participants who had previously been less politically active experienced a far greater shift in perception and behavior toward increased civic

participation, than those jurors who were already politically active. *Id.* at 9.

In further exploring these results, researchers have discovered that "a subjectively satisfying deliberative experience during jury service can reinforce civic identity, trust in fellow citizens, and faith in public institutions." John Gastil et al., *From Group Member to Democratic Citizen: How Deliberating with Fellow Jurors Reshapes Civic Attitudes*, 34 Human Commc'n Res. 137, 139, 145 (2008) ("Positive changes in jurors' civic identity and trust in fellow citizens and public institutions flow from the deliberative quality of talk in the jury room and overall satisfaction with the jury deliberation and verdict.").

Jury service is not only a fundamental component of civic engagement, but it plays a significant and powerful role in promoting electoral participation, democracy and citizenship. Systematically excluding African-Americans or any distinctive group or other subsection of the population from jury service, can have a profound and widespread chilling effect on that community's civic and political engagement.

II. SYSTEMICALLY EXCLUDING AFRICAN-AMERICANS FROM THE JURY VENIRE PANELS DETRIMENTALLY IMPACTS THE EFFECTIVENESS AND LEGITIMACY OF THE JURY SYSTEM

In addition to the serious harm that excluded jurors suffer from such systematic exclusion, there is another compelling reason to ensure that jury venire panels are diverse and representative: such panels will lead to the creation of petit juries that operate

with greater efficacy and are likely to be perceived, by the public at large, as more legitimate.

A. A Jury's Racial Composition Can Influence the Nature and Quality of Its Deliberation Processes and the Verdict

Social science studies examining the influence of racial composition on group decision-making in a jury context suggest that diverse juries are better decision-makers than homogeneous ones. Racially diverse juries are more thorough, accurate, and open minded than homogenous juries. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. of Personality & Soc. Psychol. 597 (2006); *see also* Valerie P. Hans & Neil Vidmar, *Jury Selection, in The Psychology of the Courtroom* 42 (N.L. Kerr & R.M. Bray eds., 1982) (citing empirical evidence suggesting that ". . . a jury composed of members with a range of individual experiences, knowledge, and abilities will result in a variety of perspectives that will generate more ideas and more robust deliberations, resulting in better fact finding (problem solving).").

In one recent study, researchers found that by every deliberation measure examined, heterogeneous juries outperformed homogenous ones: diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements in discussing the evidence than did all-white juries. Sommers, *supra*, at 608. As Sommers observed: "The extent to which racial diversity facilitates information exchange and problem solving certainly indicates advantages for heterogeneous groups,

especially for complex decisions." *Id.* at 598. This finding is consistent with the conclusions of general social science research regarding diversity in group decision-making and task performance, which has identified enhanced information sharing and improved decision-making as among the positive effects of racial heterogeneity. *See, e.g.*, Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Moderating Effects of Work Group Perspectives on Diversity*, 46 Admin. Science Q. 229, 266 (2001).

Legal scholarship also supports the proposition that a jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to review the evidence in light of different perspectives, and thus, engage in a more thorough debate. *See* Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. Chi. Legal F. 161, 165 (1998). Ramirez observes that:

> [R]acially diverse juries bring to their deliberations a broader range of life experiences that allow them to use their common sense more effectively when they evaluate the facts presented at trial. . . . To the extent that a racially mixed jury facilitates the sharing of diverse perspectives, information, and experiences, that sharing may lead to a more thoughtful and informed verdict.

Id.; *see also* Joshua Wilkenfeld, *Newly Compelling: Reexaming Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 Colum. L.

Rev. 2291, 2308 (2004) (citing legal scholarship concluding that diversity may increase a jury's ability to interpret the significance of facts and law).

Another benefit to greater diversity is that heterogeneous juries can affirmatively reduce or eliminate any randomly distributed racial biases or prejudices that accompany jurors to the courtroom. Empirical studies have found that a jury's racial composition may trigger normative pressures regarding race by activating jurors' motivations to avoid prejudice. Hans & Vidmar, *supra*, at 42 ("[T]he presence of [minority jurors] may inhibit majority group members from expressing prejudice, especially if the defendant is from the same group as the minority group jurors"); *see also* Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 Law & Hum. Behav. 545 (1995) (finding that the mere expectation of deliberating on a racially heterogeneous jury affected mock jurors' perceptions of blameworthiness).[2]

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[2] Despite, the enormous progress that has been made, there is still considerable evidence that racial bias remains in jury deliberations. Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 85 (1993) ("[W]henever a connection exists...white jurors are harsher with black defendants and more lenient with those charged with crimes against black victims than black jurors."); *see also* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Racial Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201, 220 (2001) (finding that in studies with mock jurors "[w]hen race was made a salient...Whites demonstrated no signs of discrimination, apparently because the racial content of the trial activated a motivation to appear non-prejudiced. However, when race was not a salient issue, a motivation to avoid prejudice was not expected among jurors, and White

All of this research only confirms what this Court acknowledged several decades ago in *Peters v. Kiff*, 407 U.S. 493, 503 (1972): "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Diverse, racially heterogeneous juries lead to better and more just results.

B. The Failure To Empanel Diverse Juries Can Undermine the Public's Confidence in the Legal System

The systematic exclusion of African-Americans from jury venire panels should be alarming for another reason as well: the failure to empanel diverse juries has deleterious consequences on the perception of the legitimacy of the legal system as a whole.

Generally, the level of satisfaction that people feel with the decision of a trier of fact is strongly influenced by their perceptions of the fairness of the procedures used by the trier to reach that decision. *See, e.g.*, John W. Thibaut & Lauren S. Walker, *Procedural Justice: A Psychological Analysis* (1975); *see also* Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 L. & Soc'y Rev. 601, 603 (2005) (noting that "[s]ocial scientific research

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mock jurors did indeed demonstrate racial bias in their judgments.").

has amply demonstrated that perceived injustice in distribution systems leads to declines in perceptions of institutional legitimacy, respect for authority, and even law-abidingness"). As such, existing research confirms that jury composition can influence the perceived fairness of a trial and the perceived accuracy of a final verdict. "Regardless of any direct effects on the verdict, unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes." Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1038, 1049 (2003) (finding that when a jury is racially heterogeneous, the outcome does not influence the perceived fairness of the trial; however, when the jury is homogeneous (i.e., an all-white jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair); *see also*, Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 Am. Crim. L. Rev. 1177, 1181-84 (1994) ("Procedural fairness can persuade participants and observers to accept an outcome as fair even when that decision is not the one they would have preferred.").

Indeed, the empirical evidence confirms this Court's recognition that discriminatory jury selection "undermine[s] public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 88 (1986); *see also Johnson v. California*, 545 U.S. 162 (2005) ("[T]he overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from

making a significant contribution to governance on account of his race. Yet the 'harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.'"). A 1999 survey conducted by the American Bar Association found that the public's continued support for the justice system stems from its trust in the role of the jury. American Bar Association, *Perceptions of the U.S. Justice System* 6-7 (www.abanet.org/media/perception/home.html). In order to preserve the legitimacy of the jury and the justice systems, jurors must be selected from a panel that is representative of the community.

The empirical evidence demonstrates that a jury's racial composition has the potential to influence its decision-making process, its final verdict, and ultimately, the level of confidence the public has in the legal system, thus, reinforcing the importance of not only the final composition of the jury, but also of the make-up of jury venire panels and the processes by which jurors are selected.

III. THE SIXTH CIRCUIT'S CONCLUSION THAT THE MICHIGAN SUPREME COURT ERRED IN REJECTING MR. SMITH'S SIXTH AMENDMENT FAIR CROSS-SECTION CHALLENGE WAS PROPER AND SHOULD BE AFFIRMED

The Sixth Circuit properly concluded that Mr. Smith's Sixth Amendment right to an impartial jury drawn from a fair cross-section of his community was violated because his prima facie showing as required in *Duren* was not rebutted by the State. *Smith v. Berghuis*, 543 F.3d 326, 329 (6th Cir. 2008),

cert. granted, 130 S. Ct. 48 (2009). The Michigan Supreme Court's conclusion to the contrary was unreasonable and in violation of this Court's clearly established precedent.[3]

A. The Sixth Circuit Properly Concluded that the Representation of African-Americans on Kent County Venire Panels Was Not Fair and Reasonable[4]

Under the second prong of the *Duren* test, Mr. Smith was required to show "that the representation [of African-Americans] in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community . . . ." *Duren*, 439 U.S. at 364. In considering Mr. Smith's evidence, the Sixth Circuit used both the absolute and comparative disparity tests. 543 F.3d at 336-37. Under the former, which compares the number of jury eligible members of a distinctive group to the number of members from that group that actually appear on the venire panel, the court found a 1.28 percent disparity. *Id.* at 337.[5] While the Sixth Circuit acknowledged that federal courts nationwide

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[3] Amici respectfully refer the Court to pages 1-14 of Respondent's brief for a full description of the facts and procedural posture in this case.

[4] Both parties concede that the first *Duren* prong—i.e., "that the group alleged to be excluded is a 'distinctive' group in the community"—was satisfied here. *See* Pet. Mem. at 19-20; Respondent Mem. at 24-27.

[5] In reaching that calculation, the court took the percentage of jury eligible Kent County African-Americans (7.28 percent) and subtracted the percentage of African-Americans that appeared on venire panels around the time of Mr. Smith's trial (6.00 percent). 543 F.3d at 337.

have consistently held that "absolute disparities in this range are not constitutionally significant for purposes of *Duren's* underrepresentation requirement," *id.* (citations omitted), it proceeded to conduct an analysis using the comparative disparity test. With this metric, which "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service," *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3d Cir. 1992), the court found that African-Americans were underrepresented by 18 percent in the six months prior to Mr. Smith's trial, and 34 percent in the month that he was tried. 543 F.3d at 338. Based on these calculations, and after careful consideration of this Court and its sister circuits' precedent, the Sixth Circuit concluded that Mr. Smith satisfied his burden under the second *Duren* prong. *Id.* at 338-39.

Petitioner asserts that the Sixth Circuit's consideration of both tests was in error and not consistent with this Court's holdings in *Taylor* and *Duren*. Instead, Petitioner urges the adoption of a narrow rule under which a criminal defendant only makes a prima facie showing sufficient to satisfy *Duren's* underrepresentation prong where he has demonstrated at least a 10 percent disparity under the absolute disparity test. Pet. Mem. at 45-46. Such a rule, however, is not only inconsistent with this Court's clearly established precedent, but it would also trample potential jurors' Fourteenth Amendment right to equal protection under the law.

This Court, as the Sixth Circuit properly acknowledged, has never required a particular

metric for determining whether a group's representation was fair and reasonable. In *Duren*, this Court used the absolute disparity test to conclude that women were underrepresented by 35 percent in Missouri jury venire panels, 439 U.S. at 365-36. The Court has never, however, mandated that the absolute disparity test ***must*** be used. *See* Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 Yale L. J. 1568, 1595 (2007) (observing that "the Supreme Court has not prescribed a specific metric for group representation"). In fact, courts have consistently used a variety of tests, including the comparative disparity test, when analyzing underrepresentation in jury venire panels. *See, e.g.*, *Ramseur*, 983 F.2d at 1231 ("In proceeding to determine whether a non-random disparity existed, we examine evidence of absolute disparity, comparative disparity, and deviation from expected random selection."); *United States v. Orange*, 447 F.3d 792, 798 (10th Cir. 2006) (acknowledging reliance within that circuit on both the absolute and comparative disparity tests); *Re-Justifying*, 116 Yale L. J. at 1596 (noting that several tests have been used by federal courts to judge claims of underrepresentation).

Moreover, the current standard protects potential jurors' equal protection rights because it provides federal courts with the necessary flexibility to determine whether jury venire panels are in fact fair and representative. As courts have repeatedly recognized, relying on the absolute disparity test alone is insufficient because it is not always capable of measuring if a particular subsection of the

community has been excluded from the venire. This is particularly true when examining relatively small groups. *See United States v. Weaver*, 267 F.3d 231, 242-3 (3d Cir. 2001) (noting that "[s]ome courts have found that the absolute disparity calculation 'understates the systematic representative deficiencies' in cases . . . [where] the groups at issue comprise small percentages of the general population"); *see also United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) (same). For example, as the Sixth Circuit noted, even if no African-Americans were ever called for jury service in Kent County the absolute disparity would never exceed 10 percent. 543 F.3d at 338.

Of course, the comparative disparity test is also not without its own shortcomings. As one court has observed, that test often "distorts the proportional representation," especially when the allegedly underrepresented group makes up only a small percentage of the total population. *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984); *see also Orange*, 447 F.3d at 799 (same). Given the unfortunate reality of there being no current metric that can fully ensure that jury venire panels are fair and representative, the current method of using a variety of tests is consistent with not only this Court's jurisprudence, but also with common sense. As this Court wrote in *Taylor v. Louisiana*: "Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place." 419 U.S. 522, 537 (1975). Accordingly, any standard that measures representation must be flexible enough to account

for this country's ever-shifting demographic landscape.

It is true, as Petitioner contends, that some circuits have adopted the absolute disparity test to the exclusion of all others. *See, e.g., United States v. Royal*, 174 F.3d 1, 7 (1st Cir. 1999) (reaffirming the court's decision to use the absolute disparity test only); *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989) ("[W]e have consistently favored an absolute disparity analysis and have rejected a comparative disparity analysis."); *but see also United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) (urging the *en banc* 8th Circuit to overturn precedent preventing the panel from using the comparative disparity test). However, those courts have failed to faithfully apply this Court's Sixth and Fourteenth Amendment jurisprudence. As the Third Circuit has persuasively explained:

> The imbalance necessary to establish an equal protection or Sixth Amendment violation in the composition of a jury venire is not determined by a bright line test. The Supreme Court has never announced mathematical standards that would apply to all such challenges. The Court has, however, recognized that it may be possible to infer that unconstitutional exclusion of cognizable groups exists when there is a disparity between a group's population figures and its representation in the jury venire sufficiently large that it is extremely

> unlikely that the disparity results from random chance.

Ramseur, 983 F.2d at 1231 (quotation marks and citations omitted). *Amici* urge the Court to use this case as an opportunity to clarify and restate its earlier rulings and ensure that federal courts have the flexibility and discretion to ensure that jury venire panels are fair and representative.

B. The Record Clearly Supports the Conclusion that African-Americans were Systematically Excluded from the Kent County Jury System

The Sixth Circuit was also correct in concluding that Mr. Smith satisfied the third *Duren* prong: namely, that the underrepresentation in the Kent County jury venire panels is due to systematic exclusion of African-Americans in the jury selection process. *See Duren*, 439 U.S. at 364.

Mr. Smith advanced three arguments to support his claim of systematic exclusion: (i) the practice, which was in effect at the time of his trial, of first assigning jurors to local Grand Rapids district court panels and then to Kent County circuit courts led to an underrepresentation of African-Americans in the circuit court panels; (ii) Kent County's grant of excused absences from jury duty for, *inter alia*, lack of child care or transportation, resulted in the disproportionate exclusion of African-Americans; and (iii) the failure to send additional follow-up letters to areas within Kent County with high concentrations of non-responding African-Americans. 543 F.3d at 339. The Sixth Circuit found that Mr. Smith's arguments were sufficient to make a prima facie violation, writing:

> [T]aken together, [Mr. Smith's] proof with respect to the juror excuses and the diversion of jurors to the Grand Rapids district court under the pre-1993 assignment plan satisfied *Duren's* third prong. Given the small percentages of African American jurors and the impact that just one or two can have on the overall percentage of African Americans represented on venire panels, we find that this evidence establishes that the underrepresentation of African Americans was caused by systematic exclusion inasmuch as this selection process resulted in fewer African Americans being eligible for service on circuit county juries.

Id. at 344 (footnote omitted). While the court concluded that the State demonstrated "a significant state interest" in granting excusals for economic hardship, the record precluded it from reaching that same determination regarding the district court/circuit court assignment process. *Id.* at 345. ("Indeed, Kent County has eliminated the priority assignment policy based precisely on the grounds highlighted by Petitioner in this case.").

Petitioner's assertion that the Sixth Circuit erred cannot be reconciled with the evidence that Mr. Smith presented. Witnesses, including the Kent County court administration, acknowledged that the priority assignment policy siphoned African-American jurors away from the circuit courts. 543

F.3d at 342-3. And while neither those witnesses nor Mr. Smith provided precise percentages of African-Americans siphoned away, courts have routinely held that defendants have established a prima facie case under the third *Duren* prong where presented with similar evidence. *See generally Jackman*, 46 F.3d at 1248. Admittedly, there is no evidence that Kent County jury administrators adopted the assignment plan with the intention of systematically excluding African-Americans, however, this Court has never focused on intentionality for Sixth Amendment fair cross-section challenges. *See Duren*, 439 U.S. at 367 (focusing on the "system" that led to the underrepresentation of women in the Missouri venire); *see also Randolph v. People of the State of California*, 380 F.3d 1133, 1141 (9th Cir. 2004) (observing that under *Duren* "disproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional . . . .").

Moreover, a broader review of Kent County jury selection processes reveals that the systematic exclusion of African-Americans is a longstanding and continuing problem. An informal study conducted by a member of the County's jury commission, Wayne J. Bentley, from 2001 to 2002, found that juries in Kent County were not comprised of a fair cross section of the community. Among Mr. Bentley's key findings are: (i) the addresses from which undeliverable jury questionnaires were returned were concentrated in census tracts made up primarily of African-Americans; (ii) the granting of hardship excuses led to the systematic exclusion of a significant number of prospective minority jurors; (iii) the County had a practice of pulling out minority jurors to serve on

district court juries first, thus, resulting in fewer, if any, minority jurors serving on circuit court juries; and (iv) a technical glitch that was present in the Kent County jury selection system from 2001 to 2002, resulted in the systematic exclusion of a significant portion of the African-American community. Wayne J. Bentley Test. 19: 7-12; 20:12-19; 21: 6-15; 32:2-6, Oct. 26, 2009.[6] It is telling that nearly a decade after Mr. Smith's trial, the same problems that contributed to minority underrepresentation in his jury venire panel were still not cured.

C. Reversing the Sixth Circuit's Decision Would Make it More Difficult to Prevent the Systematic Exclusion of Distinctive Groups in Jury Venire Panels and Result in Undercutting Excluded Jurors' Equal Protection Rights

The practical implications of adopting the holding urged by Petitioner cannot be overstated: it would have a profound chilling effect on criminal defendants' assertion of their Sixth Amendment right to a fair cross-section, making the enforcement of that constitutional guarantee extremely difficult in all but the most severe circumstances. Criminal defendants, however, would not, be the only victims of constitutionally injustice under that rule. The constitutional rights of excluded jurors would suffer serious harm as well. The fact that there is such a strong connection between these two populations is consistent with this Court's jurisprudence; in fact, in

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[6] Mr. Bentley provided testimony in support of a petition for a writ of habeas corpus in *Parks v. Warren*, 05-10036 (E.D. Mich. Oct. 26, 2009).

holding that both criminal defendants and civil litigants have third-party standing to assert the rights of prospective petit jurors who are excluded from a jury based on race, this Court has recognized the "close relation" that criminal defendants and civil litigants have to potential jurors. *See Powers*, 499 U.S. at 427 ("Voir dire permits a party to establish a relation, if not a bond of trust, with the jurors."); *see also Edmonson v. Leesvile Concrete Co., Inc.*, 500 U.S. 614, 629 (1991) ("Exclusion of a juror on the basis of race severs th[e] relation [between a civil litigant and juror] in an invidious way.").

As discussed above, excluded jurors' Fourteenth Amendment rights are intrinsically tied to the Sixth Amendment's promise of a fair cross-section; narrowly restricting the latter will result in doing the same to the former. As this Court has recognized, there exist substantial hurdles that prevent excluded jurors from vigorously enforcing their equal protection rights. *See Powers*, 499 U.S. at 415 ("The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.") (citing *Barrows v. Jackson*, 346 U.S. 249, 257 (1953)). These hurdles still exist today, thus, exclusive reliance on excluded jurors themselves to ensure that their constitutional protections are not disregarded is not likely to be effective.

While defendants do have third party standing to assert the equal protection rights of excluded jurors, the Fourteenth Amendment's stringent intentionality requirements make that constitutional provision an insufficient vehicle—by itself—for enforcing the rights of excluded jurors.

Accordingly, the Sixth Amendment, as this Court duly recognized in *Taylor* and *Duren*, can play a vital role in guaranteeing that jury venires are diverse and representative, and that all eligible individuals, regardless of their race or gender, can fully participate in the democratic process. *See Re-justifying*, 116 Yale L. J. at 1589 (explaining that the Sixth Amendment's fair cross section requirement is best understood "as a mechanism for democratic inclusion").

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the Sixth Circuit's finding that Mr. Smith was denied an impartial jury drawn from a fair cross-section of the community in violation of the Sixth Amendment.

Respectfully Submitted,

*MICHAEL B. DE LEEUW
CATHERINE MEZA
JOHNATHAN J. SMITH
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

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* *Counsel of Record*

APPENDIX

APPENDIX

AMICI CURIAE

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School ("CHHIRJ") was founded in September 2005 to continue the work of renowned legal scholar and civil rights litigator, Charles Hamilton Houston (1895-1950), and his dream of a more equitable and just society.

CHHIRJ brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers in a variety of forums, conferences and meetings. Scholarship that emerges from the Institute is incorporated into the teaching and training of the next generation of legal scholars and advocates. CHHIRJ's work is currently focused on the following issues that are central to the struggle for racial justice: closing the racial achievement gap, reforming criminal justice policies, and improving prospects for people of color and foreign-born residents to enjoy the full benefits of citizenship in this country.

National Association for the Advancement of Colored People ("NAACP") was founded in 1909 and is the nation's oldest, largest and most widely recognized grassroots-based civil rights organization. The mission of the NAACP is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The organization's more than

half-million members and supporters throughout the United States and the world have fought long and hard to ensure that the voices of African-Americans would be heard on issues ranging from the ballot box to the classroom.

The National Urban League is a historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National urban League spearheads the efforts of its local affiliates through the development of programs, public policy research and advocacy. Today, there are more than 100 local affiliates in 36 states and the District of Columbia, providing direct services that impact and improve the lives of more than two million people nationwide.

Representative John Conyers, Jr. (D-MI) is currently serving his 22nd term in the United States House of Representatives. Having entered the House of Representatives in 1965, Mr. Conyers is the second most senior member in the House of Representatives. He served as Chairman of the House Committee on Government Operations (now renamed Committee on Oversight and Government Reform) from 1989 until 1994. In 2006, Congressman Conyers was elected by his congressional colleagues to lead, as Chairman, the pivotal House Committee on the Judiciary. Congressman Conyers is also one of the 13 founding members of the Congressional Black Caucus, which was formed in 1969 to strengthen African-American lawmakers; ability to address the legislative concerns of Black and minority citizens.

Congressman Conyers supports this *amicus curaie* brief in his capacity as a member of the House of Representatives Judiciary Committee.

Wayne J. Bentley is a Grand Rapids City Middle/High School government teacher who has spent more than a decade researching the representation of minorities on Kent County juries. Through his work with his students and the Grand Rapids Bar Association, Mr. Bentley studies the jury selection process in Kent County and determined that the country's computer-operated system had routinely excluded a substantial portion of the sore neighborhoods in Grand Rapids. Mr. Bentley's research ultimately led court administrators to the discovery that a computer glitch had kept minorities from serving on local juries. In 2003, Mr. Bentley was chosen as the State Bar of Michigan's Liberty Bell Award winner. The Liberty Bell Award recognizes outstanding service performed by a non-lawyer who, in keeping with the spirit of the U.S. constitution, has given his or her time to strengthen the effectiveness of the American system of freedom under law. Currently, Mr. Bentley also serves as a Jury Commissioner for Kent County; he was appointed by the Board of Commissioners on recommendation of the Kent County Circuit Court Judges.

Richard E. Hillary is the director of the Kent County Public Defender's Office and Co-Chair Jury Minority Representation Committee of the Grand Rapids Bar Association. Mr. Hillary has practiced in Kent County Circuit Court exclusively for 18 years and has conducted over 130 felony jury trials in Circuit Court. The Grand Rapids Bar Association's Jury

Minority Representation Committee was formed in 1992-93, specifically as a result of concerns regarding minority representation in Kent County jury pools. In his capacity as a Co-Chair of the Committee, Mr. Hillary has provided testimony regarding the under-representation of African-Americans on Kent County juries. Based on research and recommendations by the Committee, the Kent County Circuit Court and District Court have implemented some changes to the jury selection process.

AMICUS CURIAE BRIEF

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No. 08-1402

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In The

Supreme Court Of The United States

MARY BERGHUIS, WARDEN
Petitioner,

v.

DIAPOLIS SMITH
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, COLORADO, IDAHO, MARYLAND, NEW MEXICO, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

TA+TC
592806

KEVIN T. KANE
Chief State's Attorney

HARRY WELLER
Senior Assistant State's Attorney

MICHAEL E. O'HARE*
Supervisory Assistant State's Attorney
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5887
Fax (860) 258-5968

*Counsel of Record

(additional counsel for amici curiae listed inside front cover)

ADDITIONAL COUNSEL

TERRY GODDARD
Arizona Attorney General
1275 W. Washington Street
Phoenix, Arizona 85007

JOHN W. SUTHERS
Attorney General
State of Colorado
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

DOUGLAS F. GANSLER
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

GARY K. KING
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

WAYNE STENEHJEM
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismark, North Dakota 58505-0040

RICHARD CORDRAY
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

HENRY D. McMASTER
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

MARTY J. JACKLEY
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501-8501

ROBERT E. COOPER, JR.
Attorney General and Reporter of Tennessee
P.O. Box 20207
Nashville, Tennessee 37202-0207

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114-2320

J.B. VAN HOLLEN
Attorney General of Wisconsin
P.O. Box 7857
Madison, Wisconsin 53707-7857

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in ruling that the Michigan Supreme Court had applied "clearly established Federal law" unreasonably when it rejected a state prisoner's Sixth Amendment fair cross section claim where the prisoner had failed to demonstrate a constitutionally significant underrepresentation of a distinctive group and that any such underrepresentation was the result of the "systematic exclusion" of that group, and in granting the prisoner relief pursuant to 28 U.S.C. § 2254.

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INTERESTS OF THE AMICI CURIAE

The State of Connecticut, and the thirteen other states that join in this brief, have a compelling interest in defending the presumptively valid judgments of their courts against post conviction claims in federal court. Accordingly, the *amici* states have an equally compelling interest in ensuring that the lower federal courts properly apply the standard of review for federal habeas corpus claims proscribed by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In addition, because the *amici* states must defend the jury selection process employed by their courts against constitutional challenges raised by criminal defendants, they have a strong interest in ensuring that the lower federal courts properly apply the law governing the Sixth Amendment's guarantee of a jury drawn from a fair cross section of the community. The Sixth Circuit's decision in this case implicates all of these concerns. Allowing the decision to stand would have a detrimental impact on both the ability of the *amici* states to defend criminal convictions obtained in their courts against federal habeas corpus challenges and to defend the jury selection process employed in their court systems against fair cross section claims. The *amici* states, therefore, have a substantial interest in the outcome of this case.[1]

---

[1] Article XXIII of the Amendments to the Constitution of the State of Connecticut established "within the executive department a division of criminal justice which shall be in charge of . . . prosecution of all criminal matters" and designated the chief state's attorney as the head of the division. Connecticut General Statutes § 51-277(c) provides that the chief state's attorney is

(continued...)

SUMMARY OF ARGUMENT

The Respondent was convicted of second degree murder in Kent County, Michigan. At trial, the Respondent claimed that the systematic exclusion of African Americans led to their underrepresented in the jury venire in violation of his Sixth Amendment right to a jury drawn from a fair cross section of the community. The trial court rejected the Respondent's claim.

On appeal, the Michigan Supreme Court upheld the trial court's ruling. The state supreme court held that the Respondent failed to make the required showings under both the second and third prongs of the test set forth in *Duren v. Missouri*, 439 U.S. 357 (1978). The Michigan court applied both the absolute disparity test and the comparative disparity test to the statistical evidence presented at trial and concluded that the Respondent had failed to demonstrate a constitutionally significant underrepresentation of African Americans in the venire. In addition, the court found that the Respondent had failed to meet his burden of showing that any underrepresentation of African Americans in

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[1](...continued)
responsible for "all appellate . . . and postconviction proceedings arising out of . . . any criminal action whether . . . denominated civil or criminal for other purposes." Thus, under Connecticut law, the chief state's attorney serves as the equivalent of the attorney general for criminal matters. Therefore, Supreme Court Rule 37.4 permits the chief state's attorney of Connecticut, as well as the attorneys general for the other *amici* states, to file supporting briefs on behalf of their respective states without the permission of the parties.

the jury venire was the result of the systematic exclusion of African Americans.

On appeal from the district court's denial of his federal petition for a writ of habeas corpus, the Sixth Circuit reversed and granted the Respondent habeas corpus relief on his fair-cross-section claim. The Sixth Circuit held that the Michigan Supreme Court applied clearly established federal law unreasonably when it rejected the Respondent's claims under both the second and third prongs of the *Duren* test. The Sixth Circuit held that reasonable application of federal law required the Respondent's claim of underrepresentation to be assessed using the comparative disparity test. Moreover, the Sixth Circuit ruled that reasonable application of federal law compelled the conclusion that a comparative disparity of 34 percent in the jury venire during the month in which the Respondent's trial took place established a constitutionally significant underrepresentation of African Americans. Finally, the Sixth Circuit ruled that reasonable application of federal law compelled the inference that persistent underrepresentation of African Americans in the jury venires was the result of systematic exclusion.

The Sixth Circuit erred in its ruling regarding both the second and third prongs of the *Duren* test. The Sixth Circuit's ruling that the Michigan Supreme Court applied clearly established federal law unreasonably in rejecting the Respondent's underrepresentation claim is erroneous for several reasons. First, the Sixth Circuit's ruling was not based on the precedent of this Court, as required by 28 U.S.C. § 2254 (d)(1). Second, there is no support for the Sixth Circuit's conclusion that

underrepresentation must be measured by any particular method. Finally, there is no support for the court's conclusion that a comparative disparity of 34 percent for a one month period establishes a constitutionally significant underrepresentation of a distinctive group.

The Sixth Circuit's ruling that the Michigan Supreme Court applied clearly established federal law unreasonably in rejecting the Respondent's claim of systematic exclusion is also erroneous. First, the court's ruling on systematic exclusion is not based on the precedent of this court as required by § 2254 (d)(1). In addition, there is no support for the court's conclusion that the private choices of potential jurors can be attributed to the juror summonsing process for the purpose of establishing systematic exclusion. Finally, there is no support for the court's conclusion that the mere showing of statistical underrepresentation, without evidence of disparate treatment of the distinctive group in question, is sufficient to establish systematic exclusion of that group.

STATEMENT

The Respondent, Diapolis Smith, was convicted of second degree murder after a jury trial in the Circuit Court for Kent County, Michigan. In the trial court, the Respondent claimed that he was denied his Sixth Amendment right to a jury drawn from a fair cross section of the community under *Duren v. Missouri*, 439 U.S. 357 (1979). The Respondent contended that the systematic exclusion of African Americans during the jury selection process resulted in a constitutionally significant underrepresentation of African Americans in the venire from which his jury was drawn.

The evidence adduced in the trial court showed that 7.28 percent of the jury-eligible population of Kent County was African American. Between April 1993 and October 1993, the period during which the Respondent's trial took place, 929 prospective jurors were selected from the county. If prospective jurors were selected from the eligible population entirely at random, 68 of those selected would have been African American. The evidence showed, however, that 56 of the prospective jurors selected were African American. *People v. Smith*, 463 Mich. 199, 211-12 (2000).

The evidence also showed that after prospective jurors were selected, some were assigned to serve as jurors in the district courts of the county. Prospective jurors who were not selected in the district courts were available to serve as jurors in circuit court. *People v. Smith*, 463 Mich. at 210-211. The City of Grand Rapids, which is located in Kent County, is served by the 61st District Court. Id., at 210. Under Michigan law, only

residents of Grand Rapids could be selected for jury service in the 61st District Court. *Smith v. Berghuis*, 543 F.3d 326, 331-32 (6th Cir. 2008). The population of Grand Rapids was 18.5 percent African American; *People v. Smith*, supra, 211; and 85 percent of the African American population of Kent County resided in the city. *Smith v. Berghuis*, supra, 344. The record, however, included no evidence regarding the effect that the preliminary selection of district court jurors from the county jury pool had on the number of African American jurors ultimately available to serve in the circuit court.

The trial court rejected the Respondent's fair cross section claim and denied relief. The Respondent appealed and the state Court of Appeals reversed. The prosecution then sought leave to appeal which was granted by the Michigan Supreme Court. *People v. Smith*, 463 Mich. at 212-13. On appeal, the Supreme Court rejected the Respondent's claim because he had failed to make the required showings with respect to either the second or third prongs of the *Duren* test. Id., at 202-205.

In ruling on the Respondent's claim that African Americans were underrepresented in his jury venire, the Michigan Supreme Court observed that since *Duren*, the lower federal courts have used three different methods of measuring fair and reasonable representation. The court noted that each method had weaknesses and each was subject to criticism. *People v. Smith*, 463 Mich. at 203-204. The court concluded, therefore, that "no individual method should be used exclusive of the others" and instead adopted a case by

case approach. Id., at 204. The court rejected the Respondent's claim because he had failed to show a constitutionally significant disparity under either of the two most commonly used methods, absolute disparity or comparative disparity. Id., at 205-205.[2]

Despite the fact that it found no constitutionally significant underrepresentation, the Michigan court went on to consider the Respondent's claim that African Americans were systematically excluded from the jury venire. The Respondent claimed that African Americans were systematically excluded from being prospective jurors in the Kent County Circuit Court in three ways. First, he claimed that the practice of excusing prospective jurors for reasons such as lack of transportation or child care had a disproportionate effect on African Americans. Second, he claimed that Kent County's failure to aggressively pursue persons not responding to the initial questionnaire or to follow up on questionnaires returned as undeliverable reduced the number of potential African American jurors. Finally, he claimed that the pool of African American jurors available to serve in the circuit court was diminished by the selection of jurors from Grand Rapids to serve in the 61st District Court. *People v. Smith*, 463 Mich. at 224-26.

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[2] With respect to the third method, which is known as the standard deviation test, the Michigan Supreme Court quoted the Second Circuit in noting that "no court in the country has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." (Alteration in original.) *People v. Smith*, 463 Mich. at 204, quoting *United States v. Rioux*, 97 F.3d 648, 655 (2nd Cir. 1996).

The Michigan Supreme Court rejected the Respondent's claim that African Americans were systematically excluded from the jury venire. The court concluded that the first two problems cited by the Respondent were outside factors that were not "inherent in the particular jury selection process . . . used by Kent County." *People v. Smith*, 463 Mich. at 226; see *Duren*, 439 U.S. at 366. The court also rejected the Respondent's claim that selecting jurors for the district courts from the county juror pool "siphoned away" prospective African American jurors from the circuit court. The court concluded that the Respondent failed to carry his burden of proof by presenting evidence to show that the practice did, in fact, diminish the number of African American jurors available for service in the circuit court. *People v. Smith*, supra, 225.

Thereafter, the Respondent filed a petition for a writ of habeas corpus pursuant to § 2254 claiming, *inter alia*, that he was denied his right to a jury drawn from a fair cross section of the community. The district court denied the Respondent's petition. *Smith v. Berghuis*, 543 F.3d at 333. The Respondent appealed and the Sixth Circuit reversed, concluding that "the Michigan Supreme Court unreasonably applied *Duren*'s three prong test in rejecting [the Respondent's] Sixth Amendment claim." Id., at 336. Because it is clear that African Americans are a distinctive group; see *Peters v. Kiff*, 407 U.S. 493, 503 (1972); the court indicated that it would address "only the second and third prong of the *Duren* prima facie test and the relative Michigan state court findings." *Smith v. Berghuis*, supra, 336.

In addressing the Respondent's claim regarding the second prong of the *Duren* test, the Sixth Circuit acknowledged that "the absolute disparity between jury-eligible African Americans and those that actually appeared for venire panels was 1.28 percent." *Smith v. Berghuis*, 543 F.3d at 337. Such a disparity falls far below the level that would establish a constitutionally significant underrepresentation for the purposes of *Duren*. See, e.g., *United States v. Rioux*, 97 F.3d 648, 658 (2nd Cir. 1996) (2.14 absolute disparity "statistically insignificant"); *United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir.), cert. denied, 519 U.S. 985 (1996)(4.9 absolute disparity constitutionally acceptable); *United States v. Biaggi*, 909 F.2d 662, 677-78 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) (4.7 absolute disparity not "a violation of the fair cross-section requirement").[3]

The Sixth Circuit, however, questioned "the wisdom of applying the absolute disparity test to the small African American population of Kent County . . ." *Smith v. Berghuis*, 543 F.3d at 337. The court, citing *United States v. Jackman*, 46 F.3d 1240, 1247 (2nd Cir. 1995) and *Foster v. Sparks*, 506 F.2d 805, 835 (5th Cir. 1975), concluded that "[w]here the distinctive group alleged to have been underrepresented is small . . . the comparative disparity test is the more appropriate

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[3] "[T]he absolute disparity method measures the difference between the group's representation in the population and in the jury pool." *United States v. Rioux*, supra, 656.

measure of underrepresentation. *Smith v. Berghuis*, supra, 338.[4]

The Sixth Circuit then noted that application of the comparative disparity test to the Kent County venire panels revealed that African Americans were underrepresented by 18 percent in the six months preceding the Respondent's trial and by 15 percent in ten of the eleven months after trial. *Smith v. Berghuis*, 543 F.3d at 336-38. As with the absolute disparity in this case, these figures fall far below the level of comparative disparity needed to establish underrepresentation for the purposes of *Duren*. See, e.g., *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996) (comparative disparity of 33 percent insufficient to satisfy second prong of *Duren*); *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3rd Cir. 1992), cert. denied, 508 U.S. 947 (1993)(rejecting a fair cross section claim based on a comparative disparity of 40 percent); *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990)(comparative disparity of 40 percent not large enough to establish unreasonable representation under *Duren*).

The Sixth Circuit, nevertheless, determined that the Respondent met the requirements of the second

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[4] The comparative disparity method "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3rd Cir. 1992), cert. denied, 508 U.S. 947 (1993). Comparative disparity is calculated by dividing the "absolute disparity" in the groups representation by its percentage of the population and then multiplying by 100 percent. *Rioux*, 97 F.3d at 655.

prong of the *Duren* test because of an increase in the comparative disparity during the month in which the Respondent's trial took place. The court noted that the comparative disparity during this month "increased to 34 percent." *Smith v. Berghuis*, 543 F.3d at 338. Based on the 34 percent comparative disparity during the month of the trial and the 18 percent comparative disparity in the six preceding months, the court concluded that the Respondent had "established that African Americans were underrepresented on Kent County venire panels." Id.[5]

In order to prevail on the third prong of the *Duren* test, the Respondent had to show that the underrepresentation of African Americans was due to their "systematic exclusion . . . from the jury selection process." *Duren v. Missouri*, 439 U.S. at 364. In this case, the Sixth Circuit's analysis of the third prong was based on its conclusion that the Respondent had "demonstrated that African Americans were underrepresented on Kent County venire panels by

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[5] The Sixth Circuit cited *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) and *Ramseur v. Beyer*, 983 F.2d at 1232, in support of its conclusion that a comparative disparity of 34 percent established constitutionally significant underrepresentation for the purposes of *Duren*. While the Eighth Circuit's decision in *Rogers* provides at least equivocal support for the court's conclusion, the Third Circuit's decision in *Ramseur* stands for precisely the opposite proposition. In *Ramseur*, the Third Circuit described a comparative disparity of 40 percent as being "borderline" and "at the margin of the range found acceptable by the courts." *Rasmeur v. Beyer*, supra, 1232. The court, nevertheless, concluded that the evidence did not "convincingly demonstrate that the representation of African-Americans on jury pools was unfair or unreasonable." Id., at 1235.

between 15 and 18 percent over a period of 17 months and 34 percent in the month during which his jury was drawn." *Smith v. Berghuis*, 543 F.3d at 340. The court observed that "[w]hile this disparity may not rise to the level of demonstrating systematic exclusion *per se*, this persistent disparity combined with the petitioner's evidence that this disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*." Id. The court concluded, therefore, that the Respondent had "demonstrated that the underrepresentation of African Americans was 'inherent in the particular jury-selection process utilized,' and [that he had] met his burden to demonstrate that African Americans were systematically excluded from Kent County venire panels." Id.

ARGUMENT

The Sixth Circuit Erred In Ruling That The Michigan Supreme Court Applied Clearly Established Federal Law Unreasonably In Rejecting The Respondent's Sixth Amendment Fair Cross Section Claim

The Sixth Amendment guarantees the defendant in a criminal prosecution the right to trial by a fair and impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court stated that in order to ensure fairness and impartiality, the jury must be "a body that is truly representative of the community . . . and not the organ of any special group or class." (Citation and quotation marks omitted.) Id., at 527. Thus, "the selection of the petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." Id., at 528. Accordingly, the Sixth Amendment requires that potential jurors be drawn from a venire that is a "fair cross section of the community." Id., at 530.

Nevertheless, the *Taylor* court recognized that "[t]he fair-cross-section principle must have much leeway in application." Id., at 537-38. The court noted that "[s]tates remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may fairly be said that the jury lists or panels are representative of the community." Id., at 538. The court emphasized that while "petit juries must be drawn from a source fairly representative of the community [there is] no requirement that petit juries actually chosen mirror the community and reflect the

distinctive groups in the population." Id. Thus, "[d]efendants are not entitled to a jury of any particular composition . . . but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id., see *Swain v. Alabama*, 380 U.S. 202, 208 (1965) (jury venire not constitutionally required to precisely mirror community).

In *Duren v. Missouri*, supra, this Court identified three factors that a defendant must establish to make a prima facie showing that his right to a jury drawn from a fair cross section of the community has been violated. Under the *Duren* test, the defendant must prove:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systemic exclusion of the group from the jury selection process.

Duren, 439 U.S. at 364. Once the defendant has made a prima facie showing of an infringement of his right to a jury drawn from a fair cross section of the community, "the State bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." Id., at 368; see *Taylor*, 419 U.S. at 533-35.

In this case, the Respondent challenged the Michigan Supreme Court's rejection of his fair-cross-section claim in a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The standard governing review of claims by federal habeas corpus petitioners challenging a state conviction is set forth in § 2254 (d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"). Section 2254 (d) provides, in pertinent part, as follows:

> (d) An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . .

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor, writing for the court, observed that § 2254(d)(1) "prohibits a federal court from granting a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., at 399. Justice O'Connor explained that "the phrase 'clearly established

Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of this Court as of the time of the relevant state-court decision." Id., at 412. Justice O'Connor stated, therefore, that "§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." Id.

In this case, the Sixth Circuit granted habeas corpus relief and ordered a new trial. The Sixth Circuit held that the Michigan Supreme Court unreasonably applied this Court's ruling in *Duren v. Missouri* when it rejected the prisoner's Sixth Amendment fair-cross-section claim. *Smith v. Berghuis*, 543 F.3d at 336. When the Sixth Circuit's decision is considered, however, it is clear that the court of appeals failed to heed this Court's admonition that "[t]he fair-cross-section principle must have much leeway in application." *Taylor v. Louisiana*, 419 U.S. at 537-38. Instead, the court proceeded on the assumption that the Sixth Amendment requires that jury venires precisely, or at least closely, reflect the racial and ethnic composition of the communities from which they are drawn. Consequently, the Sixth Circuit took the Kent County court system to task for its failure to produce the idealized jury pool that the court wrongly believes the Sixth Amendment requires. The Sixth Circuit's misconception regarding the fair-cross-section requirement led the court into error in its application of both the second and third prongs of the *Duren* test.

A. The Michigan Supreme Court Reasonably Applied Clearly Established Federal Law in Ruling That the Respondent Had Failed to Establish Underrepresentation of African Americans in the Jury Venire

In ruling on the Respondent's fair-cross-section claim, the Michigan Supreme Court noted that this Court "has not specified the preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable." *People v. Smith*, 463 Mich. at 203. The Michigan court considered all three of the methods that have been used by the lower federal courts for measuring the representation of such groups and concluded that none of the methods was entirely satisfactory. Id. at 203-204. The court concluded, therefore, that "no individual method should be used exclusive of the others." Id. at 204.

In this case, although the Michigan court noted that the Respondent had "presented some evidence of a disparity between the number of jury-eligible African-Americans and the actual number of African-Americans . . . in the jury pool . . . ."; *People v. Smith*, 463 Mich. at 204; the court concluded that the Respondent's "statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests." Id., at 204-205.[6]

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[6] The Michigan Supreme Court noted that neither party presented testimony regarding application of the standard deviation test, the other method used to determine whether there is underrepresentation of a distinctive group in the jury pool. *People v. Smith*, 463 Mich. at 205 n.1.

The Sixth Circuit concluded that the Michigan Supreme Court's application of the second prong of the *Duren* test was unreasonable because it failed to find a constitutionally significant underrepresentation of African Americans by applying the comparative disparity test. *Smith v. Berghuis*, 543 F.3d at 338-39. The Sixth Circuit's ruling is erroneous for two reasons. First, the court's ruling is not based on clearly established federal law as determined by "the holdings . . . of this Court." *Williams v. Taylor*, 529 U.S. at 411. Second, the Sixth Circuit erred in ruling that the Michigan Supreme Court's rejection of the Respondent's claim of underrepresentation was "contrary to, or involved an unreasonable application of, clearly established Federal law. . . ." 28 U.S.C. § 2254 (d)(1).

1. The Sixth Circuit's ruling on underrepresentation was not based on clearly established federal law

In ruling on the Respondent's claim in this case, the Sixth Circuit recognized that its review of the Michigan Supreme Court's ruling was limited by AEDPA. The court acknowledged that "a federal habeas court may not reverse a state court decision on the grounds that it was unreasonable 'simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Smith v. Berghuis*, 543 F.3d at 334, quoting *Williams v. Taylor*, 529 U.S. at 411. "Instead, a federal habeas court may reverse only where the state court's application of clearly established law is 'objectively unreasonable.'"

Smith v. Berghuis, supra, 334-35, quoting *Williams*, supra, 409.

The Sixth Circuit also noted that in *Duren v. Missouri*, this Court used the absolute disparity test to determine that a 35 percent underrepresentation of women in the venire panels of the district in question violated the Sixth Amendment's fair-cross-section requirement. *Smith v. Berghuis*, 543 F.3d at 337. The court further observed that "in the years since *Duren*, [this] Court has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges." Id.

Nevertheless, the Sixth Circuit found that the Michigan Supreme Court applied "clearly established Federal law" unreasonably when it looked to both the absolute and comparative disparity tests to determine whether African Americans were underrepresented in the venire panels in this case. The Sixth Circuit questioned the "wisdom of applying the absolute disparity test to measure the underrepresentation of the small African American population of Kent County . . ." *Smith v. Berghuis*, 543 F.3d at 337. The court concluded that "where the distinctive group is small. . . the comparative disparity test is the more appropriate measure of underrepresentation. Id. at 338. Accordingly, the Sixth Circuit concluded that the Michigan Supreme Court's failure to rely exclusively on the comparative disparity test was an "objectively unreasonable" application of clearly established federal law. See Id., at 335.

There is absolutely no basis in the jurisprudence of this Court for the Sixth Circuit's conclusion that the Michigan Supreme Court had failed to apply clearly established federal law in a reasonable manner. Indeed, this Court has consistently rejected efforts by lower federal courts to reverse state-court rulings and grant habeas corpus relief without clear guidance from this Court's precedent. See, e.g., *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (state court ruling denying relief not unreasonable given lack of holdings on potentially prejudicial effect of spectators' courtroom conduct); *Wright v. Van Patten*, 522 U.S. 120, 125 (2008) (state court ruling denying relief not unreasonable where precedents do not hold that counsel's participation in sentencing hearing by speaker phone a "complete denial of counsel").

In *Williams v. Taylor*, supra, this Court made clear that § 2254 (d)(1) "prohibits a federal court from granting writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., 529 U.S. at 399. As Justice O'Connor explained, the "phrase 'clearly established Federal law, as determined by the Supreme Court of the United States'. . . refers to the holdings. . . of this Court as of the time of the relevant state-court decision." Id. at 412. Accordingly, the Sixth Circuit erred in ruling that the Michigan Supreme Court applied "clearly established Federal law" unreasonably. Cf. *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (where Supreme Court precedent did not address the issue,

circuit court erred in ruling that violation of right to law library access is a basis for federal habeas relief).

2. The Sixth Circuit erred in ruling that the Michigan Supreme Court applied clearly established federal law unreasonably when it held that the Respondent had failed to establish underrepresentation

The Michigan Supreme Court ruled that the Respondent failed to show a significant underrepresentation of African Americans in the jury venire and, therefore, failed to make the required showing under the second prong of the *Duren* test. The Sixth Circuit ruled, however, that the Michigan court had applied clearly established federal law unreasonably in rejecting the Respondent's claim. The court ruled, therefore, that the Respondent had demonstrated a constitutionally significant underrepresentation of African Americans in the venire and had met the requirement of the second prong of *Duren*.

The Sixth Circuit's ruling was erroneous for three reasons. First, the court erred in ruling that clearly established federal law required use of the comparative disparity test for measuring the alleged underrepresentation in this case. Second, the court erred in ruling that federal law permitted a finding of significant underrepresentation based on the results of the juror selection process for a single month. Third, the court erred in ruling that the results of the comparative disparity test for that month showed a

significant underrepresentation of African Americans under federal law.

In this case, the Michigan Supreme Court used both the absolute disparity test and the comparative disparity test to make its determination that the Respondent had failed to demonstrate a significant underrepresentation of African Americans. *People v. Smith*, 463 Mich. at 204-205. In contrast, the Sixth Circuit concluded that "[w]here the distinctive group alleged to be underrepresented is small . . . the comparative disparity test is the more appropriate measure of underrepresentation." *Smith v. Berghuis*, 543 F.3d at 338. The Sixth Circuit's decision to rely exclusively on the comparative disparity test is contrary to the overwhelming weight of authority among the other circuits.

The comparative disparity test is generally disfavored because it "tends to magnify the size of the disparity as the relevant group's percentage of the population decreases." *United States v. Haley*, 521 F.Supp. 290, 292 (N.D.Ga. 1981). Indeed, in *United States v. Whitely*, 491 F.2d 1248 (8th Cir.), cert. denied, 416 U.S. 990 (1974), the Eighth Circuit concluded that the comparative disparity test "distorts reality" when applied to a group which constitutes a small percentage of the population. Id., at 1249. Accordingly, comparative disparity has been consistently rejected as the appropriate method for measuring underrepresentation for fair cross section claims. See, e.g., *United States v. Sanchez-Lopez*, 879 F.2d 541, 548 (9th Cir. 1989) (comparative disparity disfavored because it exaggerates effect of any deviation); *United States v.*

Hafen, 726 F.2d 21 (1st Cir.), cert. denied, 466 U.S. 962 (1984) (comparative disparity "ordinarily inappropriate" where relevant population is small); *United States v. Rioux*, supra, 655 (rejecting use of comparative disparity test). Accordingly, the Sixth Circuit's decision to rely exclusively on the comparative disparity test was error.

Moreover, in order to prevail on the second prong of the *Duren* test, the Respondent had to show a "substantial underrepresentation [of African Americans] over a significant period of time. . . ." *Ramseur v. Beyer*, 983 F.2d at 1234. Although there was evidence in the case pertaining to the juror selection process in Kent County over a period of seventeen months, the Sixth Circuit's ruling was based, almost entirely, on the results of the selection process for one month. *Smith v. Berghuis*, 543 F.3d at 340. When the evidence from the entire period is considered, it is clear that the juror selection process was operating well within the requirements of the Sixth Amendment. Because of the small number of prospective jurors summoned in Kent County each month and the small African American population of the county, it would only have taken a difference of a few African American jurors to create a significant change in the comparative disparity. Thus, it was error for the Sixth Circuit to find underrepresentation of African Americans based primarily on evidence from a single month.

Finally, the Sixth Circuit ruled that a 34 percent comparative disparity in the jury venire during the month in which the Respondent was tried established a constitutionally significant underrepresentation of African Americans. *Smith v. Berghuis*, 543 F.3d at 338.

Courts that applied the comparative disparity test, however, consistently found that a comparative disparity of 34 percent does not rise to the level of a constitutional violation. See, e.g., *Swain v. Alabama*, 380 U.S. at 208-209 (comparative disparity of 42 percent permissible); *Ramseur v. Beyer*, 983 F.2d at 1232 (comparative disparity of 40 percent at margin of range found acceptable); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981)(comparative disparity of 46 percent does not rise to level of substantial underrepresentation); *United States v. Test*, 550 F.2d 577, 589 (10th Cir. 1976) (comparative disparity of 46 percent found not to be substantial). Accordingly, the Sixth Circuit erred in ruling that the 34 percent comparative disparity was constitutionally significant.

In this case, the Sixth Circuit's ruling was not only bereft of support from the precedent of this Court, it was contrary to the overwhelming authority in the other circuits. It is clear, therefore, that the Sixth Circuit erred in ruling that the Michigan Supreme Court applied clearly established federal law unreasonably when it rejected the Respondent's claim that African Americans were underrepresented in the jury venire.

B. The Michigan Supreme Court Reasonably Applied Clearly Established Federal Law in Ruling that the Respondent failed to Establish Systematic Exclusion of African Americans from the Jury Venire

In order to prevail on the third prong of the *Duren* test, the Respondent had to prove that the

underrepresentation of African Americans in the venire was the result of systematic exclusion. *Duren v. Missouri*, 439 U.S. at 364. The Michigan Supreme Court rejected the Respondent's claim, ruling that he had presented no evidence to show that the exclusion of African American jurors was the result of any factor "inherent in the particular jury selection process utilized." *People v. Smith*, 463 Mich. at 224. On appeal from the denial of the Respondent's federal habeas petition, the Sixth Circuit ruled that the Michigan court applied federal law unreasonably when it held that the underrepresentation of African Americans in the county jury venire was not the result of systematic exclusion. *Smith v. Berghuis*, 543 F.3d at 340.

The Sixth Circuit reasoned that the "persistent disparity" in the county court venires "combined with [the Respondent's] evidence that the disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*." *Smith v. Berghuis*, supra, 340. In reaching its decision, the court observed that "the extremely low probability that the underrepresentation would have occurred by chance provides . . . evidence that the system itself contributed to the lack of African Americans in the venire pools." Id., quoting *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996). In addition, the court noted that Kent County allowed prospective jurors to "opt out" of jury service if it would result in hardship based on child care, transportation or the inability to take time off from work. *Smith v. Berghuis*, supra, 340. Although the policy applied to all persons summoned for jury service, the court speculated that it "would likely disproportionately exclude African Americans." Id., at

341. The court also took note of the county's practice of diverting prospective jurors from the circuit court to the district courts. Id., at 342. Although there was no evidence regarding the effect that this practice had on the number of African Americans serving as jurors in the circuit court, the Sixth Circuit found that the diversion of prospective jurors did reduce the number of African Americans available to serve as jurors in that court. Id. Consequently, the Sixth Circuit stated that "the lack of random selection in the Kent County jury selection process leads us to conclude that the underrepresentation of African American resulted from processes 'inherent in the particular jury-selection process utilized.'" Id., at 341, quoting *Duren*, 439 U.S. at 366.

The Sixth Circuit's ruling is erroneous for two reasons. First, the court's ruling is not based on clearly established federal law as determined by this Court. See *Williams v. Taylor*, 529 U.S. at 412. Second, the Sixth Circuit erred in ruling that the Michigan Supreme Court's rejection of the Respondent's claim of systematic exclusion was "contrary to, or involved an unreasonable application of, clearly established Federal law. . . ." 28 U.S.C. § 2254 (d)(1).

1. The Sixth Circuit's ruling on systematic exclusion was not based on clearly established federal law

In *Williams v. Taylor*, supra, this Court stated that § 2254 (d)(1) "prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state

court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., at 529 U.S. at 399. "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Id., at 412. Accordingly, "[u]nder § 2254 (d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established law erroneously or incorrectly." *Williams*, supra, 411.

In this case, the Michigan Supreme Court held that the Respondent failed to carry his burden of showing "a systematic exclusion of African-Americans from the Kent County Circuit Court jury pool." *People v. Smith*, 463 Mich. at 206. The Sixth Circuit, however, ruled that the Michigan Supreme Court "unreasonably applied federal law when it held that the underrepresentation of African Americans did not occur as the result of systematic exclusion." *Smith v. Berghuis*, 543 F.3d at 340. In doing so, however, the Sixth Circuit neither cited a decision of this Court in support of its conclusion nor offered an explanation as to why the Michigan court's ruling was an unreasonable application of this Court's precedent. Instead, the Sixth Circuit merely explained why it found that the evidence presented by the Respondent established systematic exclusion of African Americans from the jury venire. Id.

When the Sixth Circuit's reasoning is considered, it is clear that the court's decision was not based on the

precedent of this Court, but, rather, was based on nothing more than the Sixth Circuit's own "independent judgment" that the state court had erred. See *Williams v. Taylor,* 529 U.S. at 411. The court's ruling is, therefore, error. Id., at 412.

2. The Sixth Circuit erred in ruling that the Michigan Supreme Court applied clearly established federal law unreasonably when it held that the Respondent had failed to establish systematic exclusion

The Sixth Circuit ruled that the Michigan Supreme Court applied clearly established federal law unreasonably when it rejected the Respondent's claim that African Americans were systematically excluded from the jury venires of the Kent County. The circuit court's ruling is erroneous for two reasons. First, the Sixth Circuit improperly attributed the loss of potential jurors excused for hardship to the juror selection process. Second, the Sixth Circuit improperly concluded that the diversion of potential jurors to the district court resulted in underrepresentation of African Americans without evidence to support this conclusion.

a. Jurors excused for hardship are lost for reasons external to the system

Since this Court's ruling in *Duren*, is has become clear that jurors from distinctive groups are often lost to the jury selection process for reasons that are external to the system. See, e.g., *United States v. Rioux*, 97 F. 3d

at 658 (inability to serve juror questionnaires due to "demographic changes"); *United States v. Gometz*, 735 F. 2d 475, 480 (7th Cir. 1984) (clerks cannot compensate for people who do not return questionnaire or return summonses). In other words, measuring the disparity between a "community" and the "outcome" at the end of a selection process is not an accurate method of evaluating the fairness of the process because the "outcome" may not be caused by the process. Rather, the outcome may be caused by non-random responses to the process by members of the community being tapped for jury service.

Courts applying the *Duren* test have concluded, therefore, that it is reasonable to reject a fair-cross-section claim when the primary reason for the underrepresentation is the personal conduct of individuals regarding the jury selection system. See *United States v. Rioux*, 97 F. 3d at 658. Thus, there are times when a perfectly fair jury selection process produces what appears to be "non-random" results, not because of any flaw in the system, but because of the non-random responses of real people who are asked to serve as jurors. Thus, the Michigan Supreme Court reasonably applied clearly established federal law when it concluded that the jurors who received a hardship exemption were lost to the system due to a non-systematic cause.

In *Duren v. Missouri*, this Court recognized that "a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so." *Duren*, 439 U.S. at 370. The court concluded, therefore, that "[a]n

exemption appropriately tailored to this interest would . . . survive a fair-cross-section challenge." Id. Nevertheless, the *Duren* court stressed that:

> [T]he constitutional guarantee to a jury drawn from a fair cross section of the community requires that States exercise proper caution in exempting broad categories of persons from jury service. Although most occupational and other reasonable exemptions may inevitably involve some degree of overinclusiveness or underinclusiveness, any category expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair-cross-section requirement – such as women – runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement.

Duren v. Missouri, 439 U.S. at 370.

It was reasonable, therefore, for the Michigan Supreme Court to determine that the excuse for hardship satisfied this criteria. The Sixth Circuit, nevertheless, found fault with the Michigan juror selection system because the jury clerks granted a hardship exemption to everyone who asked without qualification or question. *Smith v. Berghuis*, 543 F. 2d at 340-42. There was also testimony that the hardship exemption had a disproportionate effect on African Americans because they were most like to seek it. *Id.* By

granting the hardship exemption, therefore, Michigan supposedly introduced a non-random factor into the selection process that, according to the Sixth Circuit, created a systematic disparity in violation of *Duren*. The Sixth Circuit's conclusion was inappropriate for two reasons.

First, non-randomness was introduced to the process based on the response of potential jurors who were summoned to serve. Indeed, there is no evidence that the clerks who granted the hardship exemptions knew the race or ethnicity of those seeking them. Thus, any underrepresentation of African Americans in the venires resulting from the exemption cannot properly be attributed to the juror selection system. The selection process is designed to make it possible for all qualified person's to serve on juries, which is different from forcing all qualified persons to be available for jury service. See *United States v. Gometz*, 730 F. 2d at 480.

Second, the evidence in this case indicates that members of minority groups are more likely to pursue hardship exemptions because they are more likely to be poor, lack personal transportation or lack adequate childcare. *Smith v. Berghuis*, 543 F. 2d at 341-42. That fact, however, does not make their request for a hardship exemption any less valid or the hardship that would arise from service any more manageable. Certainly, a parent concerned about the welfare of a child, will be a distracted juror if not a downright hostile juror. "And anyone with experience as a trial judge knows that a person forced against his will to

serve on a jury is apt to be an angry juror and that an angry juror is a bad juror." *Gometz*, 730 F.2d at 480.

While it is possible for a jurisdiction to address some of these problems, such remedies are not required to avoid a successful Sixth Amendment challenge to an otherwise fair selection process. The Sixth Circuit, by labeling the hardship exemption a systematic flaw, faulted the state for not resolving the hardships that prevent people from serving as jurors. The court then based its finding of a systematic exclusion, in part, on the potential jurors lost due to the hardship exemption. It was, however, inappropriate for the Sixth Circuit to do so. In light of *Duren*'s clear statement regarding hardship exemptions, the Michigan Supreme Court acted reasonably in treating losses to the system due to social and economic factors as non-systematic and rejecting the Respondent's claim.

b. The Respondent failed to present evidence to establish systematic exclusion

In order to prevail on his claim, the Respondent had to show that the underrepresentation of African Americans was due to their "systematic exclusion in the jury selection process." *United States v. Pion*, 25 F.3d 18, 22 (1st Cir.), cert. denied, 513 U.S. 932 (1994). In order to prove systematic exclusion, the Respondent had to prove that African Americans were treated differently, and that the difference in their treatment impaired their ability to serve as jurors. See *United States v. Ireland*, 62 F.3d 227, 231 (8th Cir. 1995) ("In addition to numerical disparity, a defendant must show

that the juror selection procedure is administered in discriminatory manner."); *Schanberger v. Macy*, 77 F.3d 1424 (2nd Cir. 1996) ("[A]bsent positive evidence that some groups have been hindered in attempting to register to vote, a jury venire drawn from voter registration lists [does not] violate [ ] the Sixth Amendment's fair cross-section requirement."). In this case, there is nothing in the record to suggest that Kent County treated African Americans differently in its juror selection process.

Moreover, the showing of a "'mere statistical underrepresentation, without evidence of actual discriminatory or exclusionary practices' [is] insufficient to establish 'a prima facie violation of the Sixth Amendment fair cross-section requirement.'" *United States v. Cecil*, 836 F.2d 1431, 1446 (4th Cir.), cert. denied, 487 U.S. 1205 (1988), quoting *United States v. Lynch*, 792 F.2d 269, 271 (1st Cir. 1986). Indeed, in *Truesdale v. Moore*, 142 F.3d 749 (4th Cir.), cert. denied, 525 U.S. 951 (1998), the Fourth Circuit observed that allowing the petitioner to "substitute evidence of substantial underrepresentation for evidence of systematic exclusion would go a long way towards requiring perfect statistical correspondence between racial percentages in the venire and those in the community. Such a rule would exalt racial proportionality over neutral jury selection procedure." Id., at 755. For this reason, other circuits have rejected claims of systematic exclusion where the defendant failed to present evidence in linking alleged flaw in the system with the disparity. See, *United States v. Clarke*, 562 F.3d 1158, 1163 (11th Cir. 2009); *United States v. Rodriguez-Lara*, 421 F.3d 932, 944 n.10 (9th Cir. 2005).

In this case, the Michigan Supreme Court rejected the Respondent's claim because he failed to present evidence demonstrating that the diversion of jurors to the district court caused any underrepresentation of African American jurors in the county court jury venire. *People v. Smith*, 463 Mich. at 205. The Michigan court's ruling was entirely consistent with *Duren*'s requirement that the defendant demonstrate that the underrepresentation is "inherent in the particular jury selection process utilized." *Duren v. Missouri*, 439 U.S. at 366. Accordingly, the Sixth Circuit erred in ruling that the Michigan Supreme Court applied clearly established federal law unreasonably when it rejected the Respondent's claim that African Americans were systematically excluded from the venire.

CONCLUSION

For the foregoing reasons and those presented by the Petitioner, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted.

KEVIN T. KANE
Chief State's Attorney
State of Connecticut

HARRY WELLER
Senior Assistant State's Attorney
Appellate Bureau
Office of the Chief State's Attorney

MICHAEL E. O'HARE
Supervisory Assistant State's Attorney
Counsel of Record
Civil Litigation Bureau
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, Connecticut 06067

Counsel for Amici Curiae

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Supreme Court of the United States

MARY BERGHUIS, Warden,

Petitioner,

vs.

DIAPOLIS SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

TC+TA
59BH63

QUESTION PRESENTED

Whether the U. S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U. S. C. § 2254 on the issue of the fair-cross-section requirement under *Duren* v. *Missouri*, 439 U. S. 357 (1979), where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community compared to the venires), which this Court has never applied and which four circuits have specifically rejected.

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IN THE

Supreme Court of the United States

MARY BERGHUIS, Warden,

Petitioner,

vs.

DIAPOLIS SMITH,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Sixth Circuit Court of Appeals declared the jury selection process unconstitutional

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

because of a minor and unintended variation between the racial composition of the venire and that of the jury-eligible population, even though this variation had no discernible effect on the fairness of the trial or the reliability of the verdict. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts and history of this case are described in detail in the Brief for Petitioner at pages 2-18. We recap them here briefly to frame the issues discussed in this brief.

Diapolis Smith shot and killed Christopher Rumbly on November 7, 1991, during a fight in a bar in Grand Rapids, Michigan. He was convicted of second-degree murder in a jury trial and sentenced to life imprisonment. *Id.*, at 4-5.

Smith appealed, and the Michigan Court of Appeals remanded for an evidentiary hearing. *People* v. *Smith*, 463 Mich. 199, 208-209, 615 N. W. 2d 1, 5 (2000) (Cavanagh, J., concurring).[2] This hearing produced the details of the jury selection process.

The source list for jury selection is the list of persons who have been issued driver's licenses or identification cards. Brief for Petitioner 6. Of the mailed notices, four to five percent are returned as undeliverable. Another 15 to 20 percent do not respond. About half of the latter group respond to a second notice. For those who do not respond to the second notice, a "show cause" order is issued, but no further action is taken to enforce it. *Id.*, at 7, and n. 10.

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2. The concurring opinion is more detailed than the majority opinion.

After applying statutory exemptions, which are not challenged in this case, the list is further reduced by random selection, and the county issues summonses to those selected. The persons summoned may request to be excused for hardship, such as difficulties with child care, transportation, or employment. *Id.*, at 7-8. The defendant's expert testified that black prospective jurors are more likely to seek to be excused because far greater percentages are single parents or have no vehicle in the family. *Id.*, at 8-9.

There was also testimony regarding the allocation of jurors between the circuit and district courts. The circuit court in Michigan is the trial court of general jurisdiction. See Mich. Const., Art. VI, § 13. Kent County is one circuit. See Mich. Comp. Laws § 600.518. The district courts are courts of limited jurisdiction. In criminal cases they have jurisdiction of misdemeanors and violations of city ordinances. See Mich. Comp. Laws § 600.8311. Kent County has multiple districts, one of which is the City of Grand Rapids. See Mich. Comp. Laws § 600.8130. The present case, being a felony, was tried in the circuit court.

At the time of the present case, jurors were assigned to the district court first, and those not needed by the district court were then assigned to the circuit court. This order of assignment was reversed in the following year based on the perception " 'that the respective districts essentially swallowed up most of the minority jurors . . . .' " Brief for Petitioner 9 (quoting the court administrator). In practice, though, reversing the order of assignment made little difference. See *Smith*, 463 Mich., at 225, n. 15, 615 N. W. 2d, at 12, n. 15 (concurring opinion).

For the period April 1993 to October 1993, a period including Smith's trial, the defense expert calculated that a genuinely representative sample would have had

67.6 black jurors out of 929, or 7.28%. Because information on the race of the jurors actually summoned was not available, he had to estimate that figure at 55.4. See Brief for Petitioner 12. That comes to 5.96%. The difference is about one and one-quarter percent. Using the "comparative disparity" method, the defense expert calculated that the representation of black persons among the prospective jurors was 18% below the expected value of a random sample: (67.6 - 55.4) / 67.6 x 100 = 18.0. No testimony was presented using the "standard deviation" method. See *Smith*, 483 Mich., at 205, n. 1, 615 N. W. 2d, at 3, n. 1.

The trial court found no Sixth Amendment violation, but the Court of Appeals reversed. See *id.*, at 212-213, 615 N. W. 2d, at 6-7 (concurring opinion). The Michigan Supreme Court granted leave to appeal, reversed, and remanded for consideration of remaining issues. *Id.*, at 207, 615 N. W. 2d, at 4. On remand, the Court of Appeals affirmed in an unpublished opinion, *People* v. *Smith*, 2001 Mich. App. LEXIS 1644 (2001), and the Michigan Supreme Court denied leave to appeal. *People* v. *Smith*, 465 Mich. 951, 640 N. W. 2d 873 (2002).

On federal habeas corpus, the Federal District Court denied relief in an unpublished opinion. See *Smith* v. *Berghuis*, 543 F. 3d 326, 329 (CA6 2008). The Sixth Circuit reversed, finding the Michigan Supreme Court's decision to be unreasonable within the meaning of 28 U. S. C. § 2254(d). See Brief for Petitioner 16-18. This Court granted certiorari on September 30, 2009.

SUMMARY OF ARGUMENT

The question presented in this case concerns the fair-cross-section requirement of the Sixth Amendment. Fairly included in that question is whether the Sixth

Amendment really has a fair-cross-section requirement. It did not at the time it was adopted.

Until *Taylor* v. *Louisiana*, it was established that the cross-section requirement existing in the federal courts was not constitutional and was not binding on the States. Also, at that time, the jurisprudence of equal protection presented obstacles for defendants objecting to the exclusion of women from juries. *Taylor* read a cross-section requirement into the Sixth Amendment to avoid these limitations, but the limitations have long since crumbled.

The groups considered "distinctive" for the purpose of the Sixth Amendment are essentially the same as the classifications considered "suspect" for the Equal Protection Clause. Defendants are no longer required to be in the same group as the excluded jurors to make an equal protection objection. In this case, as in *Montejo* v. *Louisiana*, we have two constitutional provisions covering largely the same ground, with one of them having a very shaky foundation.

The Sixth Amendment cross-section requirement provides little benefit that is not already provided by the Equal Protection Clause. As the present case illustrates, it carries a cost of federal court intervention in matters that should be left to local administration.

Taylor v. *Louisiana* meets the criteria for overruling a precedent. It was poorly reasoned to begin with, and there is no reliance interest whatever at stake. Most importantly, *Taylor* is inconsistent with recent developments in the jurisprudence of the Sixth Amendment. In both the *Apprendi* and *Crawford* lines of decisions, this Court has held that the historical understanding of the Sixth Amendment is controlling.

Taylor v. *Louisiana* was useful in its day, but that day is long since past. It is time to give the *Taylor* rule

a respectful burial and rely solely on the Equal Protection Clause as the constitutional basis for protection against discrimination in the selection of juries.

ARGUMENT

The petitioner in this case argues that the Michigan Supreme Court's application of this Court's precedents regarding the "fair-cross-section" requirement of the Sixth Amendment to the facts of this case was reasonable within the meaning of 28 U. S. C. § 2254(d)(1), Brief for Petitioner 22-38, 49-62, and, even more, that it was correct. Brief for Petitioner 38-48.

These arguments are valid and provide more than sufficient justification to reverse the decision of the Sixth Circuit in this case.[3] However, a more fundamental question is fairly included in the questions posed by the petitioner. Does the Sixth Amendment really have a fair-cross-section requirement at all? That requirement was established at a time when (1) the original understanding of the Sixth Amendment had been relegated to a minor place in this Court's jurisprudence, and (2) limitations on the Equal Protection Clause rendered it ineffective for dealing with the exclusion of women from juries. Neither of those conditions is true today. We now have two bodies of jurisprudence, developed under two different sections of the Constitu-

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3. The Sixth Circuit noted, "Courts across the country have held [as the state court in this case did] that absolute disparities in this range are not constitutionally significant." *Smith* v. *Berghius*, 543 F. 3d 326, 337 (CA6 2008). That fact alone is sufficient to dispose of the case under 28 U. S. C. § 2254(d)(1). See *Carey* v. *Musladin*, 549 U. S. 70, 76-77 (2006); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey* v. *Musladin*, No. 05-785, pp. 13-16, http:\\www.cjlf.org\briefs\Musladin.pdf.

tion, covering the same territory. As in *Montejo* v. *Louisiana*, 556 U. S. __, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009), it is time to reconsider whether we can dispense with one of them.

I. The Sixth Amendment "cross-section requirement" is a fiction that has outlived its usefulness.

A. Twelve Good Men and True.

Beyond dispute, at common law neither the trial jury nor the panel from which it was derived was a representative cross-section of the community as that term is used by modern pollsters and social science researchers. Blackstone referred to the jury as "a tribunal composed of twelve good men and true . . . ." 3 W. Blackstone, Commentaries 349 (1st ed. 1768). The most obvious way in which the common law jury was not representative of the whole society is that it consisted only of men. Also, in a society formally separated into social strata, a jury of one's peers was a jury selected from the defendant's stratum, so that lords were tried by a jury of lords, see *ibid.*, a far cry from a representative slice of the community.

Property qualifications also made the jury unrepresentative. In England, the property ownership requirement "disqualified at least three-quarters of the adult male population from becoming jurors." Alschuler & Diess, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877 (1994). A property ownership requirement was not considered contrary to the fundamental right of jury trial, but just the opposite. For treason cases, the freeholder requirement was among the *protections* specified in the original Bill of Rights. See 1 W. & M., 2d sess., c. 2, § 11 (1689).

In early America, every state except Vermont had a property or taxpaying qualification. Alschuler & Diess, 61 U. Chi. L. Rev., at 877. While greater availability of land made the disqualified segment smaller than in England, the property requirement still disqualified somewhere in the range of one quarter to half. See *ibid.*

Another significant source of nonrepresentativeness was the directions to the officer charged with summoning the veniremen. The officer was not directed to summon a representative sample. A direction to the marshal to summon "a number of honest and lawful men," see *United States* v. *Fries*, 3 Dall. (3 U. S.) 515, 515 (CC Pa. 1799), on its face excludes dishonest and unlawful men, surely a substantial portion of any population. In 1930, a Philadelphia judge described how he did his additional duty as a jury commissioner:

> "In actually selecting the names, I was guided by the occupations or businesses of the electors, taking by preference those who were designated as householders and who lived on the chief streets; for, in a big city like Philadelphia, where thousands of names must be marked every year, it is impossible, for those fixed with the responsibility, to select jurors known to them personally." R. von Moschzisker, Trial By Jury 76 (2d ed. 1930).

It would have been much easier to simply pick names at random, but this judge/commissioner did not see that as his duty. He perceived his duty to be selecting jurors who would be better than average in providing a fair trial. It is fair to infer from the common expressions of "good and lawful men" and "twelve good men and true" that this was the prevailing view of what a jury should be at the time the Sixth Amendment was adopted. Not only was a *representative* cross-section not considered required for "an impartial jury,"

it was not considered desirable. See Tucker, Of the Trial by Jury in Virginia, in 4 W. Blackstone, Commentaries, Note F, Appendix 64-69 (S. Tucker ed. 1803) (decrying methods of selection then in use and proposing a statute for selecting "such as be of the best fame, reputation, and understanding, and credit, in their county").

More subtly, the officer is likely to select people known to him personally or by reputation. The "key man" system of selecting jurors persisted in many states into the late twentieth century, and it is obviously less likely than random selection methods to produce a representative cross-section. See *Castaneda* v. *Partida*, 430 U. S. 482, 497, and n. 18 (1977).

What did the First Congress, the people who drafted and approved the Sixth Amendment and submitted it to the states for ratification, think of juries that were not entirely representative of the community? While surely aware that the practices of the states for qualifying and selecting jurors did not produce a representative cross-section of the community, the First Congress nonetheless adopted the state practices for the federal court. Judiciary Act of 1789, § 29, 1 Stat. 88; see also *Taylor* v. *Louisiana*, 419 U. S. 522, 536, and n. 18 (1975).

Beyond genuine question, the Sixth Amendment as originally understood did not require that the jury be drawn from a representative cross-section of the community.

B. From Reconstruction to Hoyt *v.* Florida.

The Bill of Rights was adopted to preserve preexisting liberties from future encroachment. See *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2797, 171 L. Ed. 2d 637, 657 (2008). In the wake of the Civil War, three amendments of an entirely different charac-

ter were adopted. They were intended to make massive changes to the status quo and to clear-cut large areas of existing law. The Thirteenth Amendment eliminated the institution of slavery, the laws authorizing it, and even a part of the Constitution itself. See U. S. Const., Art. IV, § 2, cl. 3. The Fourteenth Amendment was aimed directly at the Black Codes adopted by the Southern States. See McConnell, The Importance of Humility In Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution, 65 Fordham L. Rev. 1269, 1281 (1997). The Fifteenth Amendment invalidated existing laws denying the franchise on the basis of race. See *Slaughter-House Cases*, 16 Wall. (83 U. S.) 36, 71 (1873). If the Constitution contains any provision that invalidates a jury selection practice that was common at the time of the Founding, that provision is more likely to be found in the Civil War Amendments than in the Bill of Rights.

It did not take long to apply the Fourteenth Amendment to jury selection. In the Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, § 4, 18 Stat. 336-337, Congress enacted the predecessor of 18 U. S. C. § 243. The Equal Protection Clause of the Fourteenth Amendment authorized this statute and invalidated contrary state statutes. *Strauder* v. *West Virginia*, 100 U. S. 303, 310-312 (1880); see also *Ex Parte Virginia*, 100 U. S. 339, 347-348 (1880). However, the *Strauder* Court expressly disclaimed any implication that the prohibition of the Fourteenth Amendment extended beyond racial discrimination. The State "may confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this . . . . Its aim was against discrimination because of race or color." *Strauder*, *supra*, at 310.

From *Strauder* to the mid-twentieth century, most of this Court's jury selection cases involved claims of intentional exclusion of blacks from the venire. The very next year *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881), presented a case where no black person had ever been summoned to serve as a juror, even though the black population was 26,000 out of 150,000, over 17%. This complete exclusion of a major segment of the population, by itself, established a *prima facie* case. *Ibid.* Half a century later, *Norris* v. *Alabama*, 294 U. S. 587, 598-599 (1935), presented very similar facts. The Court did not question the requirements that a juror be a "freeholder or householder," be "esteemed in the community for . . . integrity, good character and sound judgment," be able to read, and not be "an habitual drunkard." See *id.*, at 590-591 (quoting statute). Citing *Neal*, the Court did not find "the uniform exclusion of negroes from juries, during a period of many years" to be a credible consequence of the valid, neutral criteria. See *id.*, at 598-599.

On its facts, *Smith* v. *Texas*, 311 U. S. 128 (1940), was a straightforward application of the principles in *Neal* and *Norris*. In a county where blacks were 20% of the population, a total of 5 had served on 32 grand juries of 16 men each, about 1%. The evidence on the whole sustained an inference of discrimination. See *id.*, at 131-132. If *Smith* had said no more than needed to be said to decide the case, it would be simply one entry in the long and sorry history of intentional racial discrimination in jury selection. However, in a gratuitous bit of *obiter dictum*, unsupported by citation, the *Smith* Court dropped this bomb: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative* of the community." *Id.*, at 130 (emphasis added).

If "truly representative" is taken to mean what it means in modern social science research—the kind of sample one would get with a genuinely random selection process that gives every member of the community an exactly equal chance of selection—then this statement is false. The selection criteria recognized as legitimate in *Neal* and *Norris* and those employed in England and early America as described in Part I-A, *supra*, intentionally excluded many members of the community. The statute that *Smith* cited as authority in the next sentence, *id.*, at 130, n. 4, expressly recognized that there are legitimate qualifications for jury service and only barred "race, color, or previous condition of servitude" as criteria. A jury or a panel with no felons, no "habitual drunkards," and no illiterates, cf. *Norris*, 294 U. S., at 590-591, would not be "truly representative of the community" but would be fully within the "established tradition."

The representative cross-section notion received another boost from dicta in *Glasser* v. *United States*, 315 U. S. 60 (1942). In this corruption prosecution, the defendants challenged the composition of both the grand jury and trial jury. Because of the timing of a change in statutory juror qualifications, the two challenges were handled quite differently.

The governing federal statute at that time adopted the juror qualifications specified by state law. *Id.*, at 64-65. The Illinois Legislature had amended the law to allow women jurors before the grand jury was drawn, but it had allowed most of the counties extra time to update their source lists. The Court rejected the contention that the jury was illegally constituted. See *id.*, at 65. There is no hint that the complete exclusion of women was a constitutional problem when it was ultimately based on a statutory requirement.

For the trial jury, there were women in the pool, but the defendants alleged that the clerk had used a list consisting only of members of the League of Women Voters. The holding of the case is that the defendants had failed to produce evidence to support this allegation. Citing an article in the ABA Journal is not sufficient. See *id.*, at 84, 87. Given this holding, the three pages of discussion that precedes it is *obiter dicta*. The opinion discusses how "[o]ur notions of what a proper jury is have developed" since the common law, see *id.*, at 85, and, although it does not say so, since the Sixth Amendment was adopted. The opinion does not say that the "cross-section of the community" requirement is a constitutional one. Indeed, it could not, given how easily the same opinion upheld the complete exclusion of women from the grand jury when it was authorized by statute.

In *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946), a federal civil case, the cross-section requirement is the basis of an actual holding, citing *Smith* and *Glasser*, but it is not a constitutional holding. The Seventh Amendment is not mentioned in the opinion, and Justice Frankfurter notes in the dissent, "No constitutional issue is at stake. The problem is one of judicial administration." *Id.*, at 227. *Thiel* held that daily wage earners could not be excluded as a class from those summoned for jury duty on the theory they would be excessively burdened, *id.*, at 222-223, even though the judge could excuse them individually on that basis. See *id.*, at 224.

Ballard v. *United States*, 329 U. S. 187 (1946), disapproved the exclusion of women from the grand and petit juries in a federal criminal trial, but again the basis of the holding was not constitutional. The Court took care to note that the California jury eligibility rules, adopted by the federal statute, made women

eligible for jury service. The basis of the holding was the perceived intent of Congress and the prudent use of the Court's supervisory power. See *id.*, at 193. One of the defendants was a woman, see *id.*, at 194, so the case did not involve a standing problem.

Given that *Glasser* and *Thiel* relied on the dictum in *Smith*, it was not surprising that defendants in state cases would try to raise the cross-section rule to a constitutional mandate binding on the States, but the Court soon rejected that notion. *Fay* v. *New York*, 332 U. S. 261, 264 (1947), was "a challenge to the constitutionality of the special or so-called 'blue-ribbon' jury . . . ." The deficiencies alleged included underrepresentation of "laborers and such" and women, see *id.*, at 273, and preference for women recommended by organizations such as the League of Women Voters. See *id.*, at 277-278. The claims would have been valid under *Thiel* and *Ballard* in a federal trial, but those nonconstitutional precedents were inapplicable to state courts. See *id.*, at 287.

Brown v. *Allen*, 344 U. S. 443 (1953), considered a claim more along the lines of the jury cross-section claim in the present case. The claim was that the use of tax rolls as source lists produced an underrepresentation. Black persons made up 33.5% of the population but 16% of the listed taxpayers. *Id.*, at 467-468. The Court rejected the challenge.

> "We recognize, too, that we are now reviewing a constitutional objection to a state court conviction, and we may not act to alter practices of a state which are short of a denial of equal protection or due process in the selection of juries.[23] States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.

> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

"23. Rules dealing with the selection of juries in federal courts as announced in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 221, are not applicable in state court proceedings. *Fay* v. *New York*, 332 U. S. 261, 287." *Id.*, at 473-474.

In *Hoyt* v. *Florida*, 368 U. S. 57 (1961), the Court rejected a Fourteenth Amendment attack on a statute very similar to the one later struck down in *Taylor* v. *Louisiana*. The statute provided that men would be included in jury lists in the usual way, but women would be included only if they affirmatively requested to be included. See *Hoyt*, *supra*, at 58. Not surprisingly, "only a minimal number" did. *Ibid.*

The Court required only that this gender-based classification be "based on some reasonable classification and . . . the manner in which it is exercisable rest[] on some rational foundation." *Id.*, at 61. At the time, rational basis review was close to a rubber stamp of constitutionality. See 3 R. Rotunda & J. Nowak, Constitutional Law § 18.3(a)(ii), p. 307 (4th ed. 2008).

> "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be

> relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." *Hoyt*, 368 U. S., at 61-62.

As strange as it sounds to us a half century later, *Hoyt* was typical of a long line of cases upholding different treatment of men and women based on rationales along the lines that a woman's place was in the home. See *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 729 (2003) (collecting cases); see also 4 Rotunda & Nowak, *supra*, § 18.21, at 15-20. This era would soon come to an end. Just three years after *Hoyt*, Congress included a ban on sex discrimination in employment in the most important act of the twentieth century, the Civil Rights Act of 1964. See 42 U. S. C. § 2000e-2(a). A seismic shift in this Court's review of statutes treating men and women differently followed a few years later.

C. Creation of the Sixth Amendment Cross-Section Requirement.

Four years after the Civil Rights Act, Congress passed the Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, 28 U. S. C. § 1861 *et seq.* "It is the policy of the United States that all litigants in *Federal* courts entitled to jury trial shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes." 28 U. S. C. § 1861 (emphasis added). Congress chose not to impose this requirement on the States. Language imposing the cross-section requirement on the States had been included in earlier versions of this legislation but not in the bill finally enacted. See Williams, Jury Source Representativeness and the Use of Voter Registration Lists, 65 N. Y. U. L. Rev. 590, 601, n. 70 (1990).

The same year, the Sixth Amendment was held to be incorporated in the Fourteenth and applicable to the States in *Duncan* v. *Louisiana*, 391 U. S. 145, 148-149 (1968). Almost immediately, though, the Court held that the "incorporated" Sixth Amendment did not include requirements that were regarded as essential to jury trial in the eighteenth and nineteenth centuries. *Williams* v. *Florida*, 399 U. S. 78, 100 (1970), approved a six-man jury, while noting that "the number should probably be large enough . . . to provide a fair possibility for obtaining a representative cross-section of the community." *Apodaca* v. *Oregon*, 406 U. S. 404, 410-411 (1972) (plurality opinion), upheld a nonunanimous jury while repeating the *Williams* dicta about cross-section.

In *Peters* v. *Kiff*, 407 U. S. 493 (1972), the standing requirements for a Fourteenth Amendment challenge to the exclusion from jury service of a group different from the defendant were left unclear. Three Justices believed that a white defendant had standing to raise a due process challenge to the exclusion of black jurors. *Id.*, at 496-498 (opinion of Marshall, J.). Three Justices would give the defendant standing to "implement the strong statutory policy of [18 U. S. C.] § 243," *id.*, at 507 (opinion of White, J.), a rationale limited to racial discrimination. Three Justices dissented on grounds of a lack of prejudice to the defendant, an argument related to the question of standing. See *id.*, at 507-509 (opinion of Burger, C.J.).

In *Taylor* v. *Louisiana*, 419 U. S. 522, 523, and nn. 1-2 (1975), the Court was presented with a state law and constitutional provision essentially identical to the law upheld in *Hoyt*. See *supra*, at 15. Only 14 years had elapsed since *Hoyt*, but they had been 14 years of dramatic change in America. There could be little doubt that laws of the type that seemed reasonable to

the *Hoyt* Court in 1961 were by 1975 "an anachronism, inappropriate at this 'time or place.' " *Id.*, at 542 (Rehnquist, J., dissenting) (quoting majority opinion at 537).

Two obstacles stood in the way of a straightforward extension of existing equal protection doctrine to cover gender as well as race and ethnicity in jury selection. First, *Hoyt* was an on-point precedent, relatively recent, squarely holding that an indistinguishable law does not violate the Equal Protection Clause. Second, Taylor, unlike Hoyt, was a man, and his standing to object under equal protection doctrine was doubtful.

The *Taylor* Court chose to get around these problems by invoking the Sixth Amendment instead of the Fourteenth Amendment. *Taylor* considered this sufficient to distinguish rather than overrule *Hoyt*, saying, "The right to a proper jury cannot be overcome on merely rational grounds," 419 U. S., at 534, the basis of the *Hoyt* ruling. *Taylor* also held that the defendant need not be a member of the excluded group to make a cross-section claim, *id.*, at 526, but the only authority cited for the proposition is *Peters*, a case in which only a minority of the Court found standing on a ground that would apply to gender discrimination.

After a summary of the cases discussed above, *Taylor* makes a remarkable statement. "The unmistakable import of the Court's opinions, at least since 1940, *Smith* v. *Texas*, *supra*, and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id.*, at 528. But that is *not* the "unmistakable import" of the opinions. Other than dicta in *Williams* and *Apodaca*, none of the opinions relied on says *anything at all* about the Sixth Amendment. All of the cases actually holding a jury selection process to be

improper were decided under the Equal Protection Clause, a statute, or a judicially created policy where there was no contrary statute. The *Taylor* Court created the Sixth Amendment cross-section requirement out of nothing but dicta in two cases decided on other grounds.

In footnote 13, the *Taylor* opinion concedes that its holding is contrary to the understanding of the right to trial by jury at common law and in the United States through the nineteenth century. The contrast with recent Sixth Amendment jurisprudence, where historical understanding is controlling, is striking. See *infra*, at 30.

A fundamental principle of constitutional jurisprudence requires that courts form constitutional rules no broader than necessary to resolve the question before them. See, *e.g.*, *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). The *Taylor* Court did just the opposite, announcing a rule that was much broader than what was needed to strike down this explicitly different treatment of men and women. The rule was restated in a more succinct form in *Duren* v. *Missouri*, 439 U. S. 357, 364 (1979):

> "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which the jury is selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to a systematic exclusion of the group in the jury-selection process."

Potentially, this test could have involved the federal courts in a nearly complete takeover of state jury selection processes. A wide variety of groups, far beyond classifications of race, ethnicity, and gender, might be considered "distinctive." "Not fair and reasonable" might be construed to mean nearly exact proportions. "Systematic exclusion" might be construed to include any practice that causes the demographic composition of the venire to vary from that of the general population, no matter how benign its purpose. Once the prima facie case was established, *Duren* directed that "it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross-section to be incompatible with a significant state interest." *Id.*, at 368. This amorphous and subjective determination amounts to little more than the substitution of the court's policy preference for that of the State and its officials.

Fortunately, most courts did not interpret the distinctive group prong to extend beyond the same groups that would be considered suspect or quasi-suspect classifications in an equal protection analysis. "Decisions are now to be found holding various age, occupation, and disability groups among others, not distinctive under *Taylor*." 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 22.2(d), p. 56 (3d ed. 2007).

Astonishingly, the California Supreme Court came within one vote of holding that convicted felons are a distinctive group and declaring unconstitutional a statutory exclusion consistent with the common law and existing in most states to this day.[4] See *Rubio* v.

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4. Kalt, The Exclusion of Felons from Jury Service, 53 Am. U. L Rev. 65, 150-156 (2003), lists the laws as of the date of the article.

Superior Court, 24 Cal. 3d 93, 97-100, 593 P. 2d 595, 597-599 (1979). Felons would, of course, be a "distinctive" group if nothing more than " 'a flavor, a distinct quality' " were required. See *Taylor*, 419 U. S., at 532 (quoting *Ballard*, 329 U. S., at 194). The *Rubio* majority's theory that the viewpoint of robbers, rapists, and murderers can be represented by petty thieves, see 24 Cal. 3d, at 99-100, 593 P. 2d, at 599, is very doubtful as a factual matter. In addition, the *Rubio* dissent correctly noted a complete absence of authority for the majority's representation exception to *Taylor*. See *id.*, at 107, 593 P. 2d, at 604 (Tobriner, J., dissenting). *Rubio* is properly viewed as a *reducio ad absurdum*. If a conclusion that follows from a premise is preposterous on its face, the premise must be wrong. It is difficult to imagine a conclusion more preposterous than a claim that the Constitution requires that murderers must sit in judgment on a murder case.

Unlike the wide agreement on distinctive groups, the methodology for deciding what is "fair and reasonable" for the second prong of the *Duren* test has produced much more disagreement. The variations on the theme are presented in the opinions and the other briefs in the present case and need not be repeated here. See, *e.g.*, *People* v. *Smith*, 463 Mich. 199, 216-221, 615 N. W. 2d 1, 8-10 (2000) (Cavanagh, J., concurring).

Perhaps the most insidious part of the *Taylor/Duren* test, though, is the holding that nonrepresentativeness need only be the result of something "inherent in the particular jury selection practice utilized," *Duren*, 439 U. S., at 366, rather than the intentional discrimination requirement of equal protection analysis. Under this prong, procedures and criteria adopted by a State or its officials in good faith for the purpose of obtaining jurors who are conscientious in their duties or for the purpose of lessening the burden of jury service on those least

able to bear it are subject to challenge merely because they have the incidental side-effect of altering the demographic composition of the venire.

In the three decades since *Duren*, this Court has not returned to the venire selection question, leaving all the dangling questions from *Taylor* and *Duren* to be thrashed out by the lower courts. What this Court's later cases have addressed, though, is that, after being mandated to provide a representative cross-section in the venire, the State is then free to intentionally make the final trial jury nonrepresentative. The State may exclude from a capital case those persons whose views on capital punishment would interfere with their function in the sentencing phase. See *Lockhart* v. *McCree*, 476 U. S. 162, 176-177 (1986); *Buchanan* v. *Kentucky*, 483 U. S. 402, 415 (1987). Even the intentional use of peremptory challenges to exclude all jurors of a particular race does not violate the *Taylor/Duren* rule, *Holland* v. *Illinois*, 493 U. S. 474, 478 (1990), although of course it does violate the Equal Protection Clause. See *id.*, at 479. It is an odd rule of law that creates a right to representativeness only at the stage where it does not matter.

These oddities bring us back to the point of origin. The Sixth Amendment cross-section requirement was a fiction from the beginning. See *Duren*, 439 U. S., at 370-371 (Rehnquist, J., dissenting); see also Leipold, Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation, 86 Geo. L. J. 945, 950 (1998) ("lacks a solid intellectual foundation"). It was a useful fiction at the time, but, as we will describe in the next section, that time is past.

D. The Robust Equal Protection Clause.

The irony of *Taylor* is that it made an end-run around obstacles to relief under the Equal Protection Clause at the very time when those obstacles were crumbling. The changes in equal protection jurisprudence that would have been needed to strike down the Louisiana law in *Taylor* were already in the process of being made.

In the 1970s, the standard for review of gender classifications in statutes was in flux, but it was something more than the toothless rational basis review epitomized by *Hoyt*. See 4 Rotunda & Nowak, *supra*, § 18.22, at 20-27. In *Reed* v. *Reed*, 404 U. S. 71, 76-77 (1971), a presumption that men were more fit to administer estates was struck down. *Frontiero* v. *Richardson*, 411 U. S. 677, 678 (1973), involved a military benefits statute that presumed married men were the breadwinners of their families, and thus entitled to an extra allowance, but required married women to affirmatively show that their husbands were dependent on them in order to qualify. This presumption was the flip side of the presumption underlying the statute in *Hoyt* that women were the caregivers of the family, but while *Hoyt* affirmed on that basis, see *supra*, at 15, *Frontiero* struck the statute down, without agreement on the standard of review. See *id.*, at 688-691 (plurality opinion); *id.*, at 691-692 (Powell, J., concurring in the judgment). In *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), differential treatment of men and women for the purpose of the minimum age for buying beer was struck down under a standard that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." The statutes in *Hoyt* and *Taylor* would not come close to passing that test. The

application of this test to a statute that disadvantaged men left no doubt that the test was symmetrical.

Craig is also significant for another change in equal protection law. The complaint of the original primary plaintiff, Craig, was moot because he had aged out of the disadvantaged 18-20 category. See *id.*, at 192. The case went forward on the theory that a seller of beer had standing. See *id.*, at 192-194. The thinness of support for this holding did not go unnoticed. See *id.*, at 216 (Burger, C.J., dissenting). Less than two years after *Taylor*, then, it was apparent that neither the standing issue nor the standard of review would have prevented the same result under an equal protection analysis.

When this Court's focus in jury selection cases shifted from the summoning of the venire to the selection of the trial jury, the Equal Protection Clause reemerged as the primary source of constitutional protection. Discriminatory use of peremptory challenges on the basis of race violates the Equal Protection Clause, *Batson* v. *Kentucky*, 476 U. S. 79, 96 (1986), but not the Sixth Amendment. *Holland* v. *Illinois*, 493 U. S., at 478. *Powers* v. *Ohio*, 499 U. S. 400, 415 (1991), eliminated any doubt that the defendant need not be a member of the same group as the excluded jurors to have standing to raise an equal protection claim. *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 130-131 (1994), extended the *Batson* framework to discrimination on the basis of gender.

As far as this Court's precedents go, the Sixth Amendment cross-section requirement is now completely superfluous. There are no cases where a defendant prevailed on such a claim who would not prevail with an equal protection claim under current law. This is largely true of decisions in other courts as well. As noted in Part I-C, *supra*, attempts to define groups as

"distinctive" for cross-section claims beyond the classifications considered "suspect" for equal protection claims have been overwhelmingly rejected. This case presents the question of whether this largely superfluous requirement is worth keeping at all.

II. *Stare decisis* does not require keeping a fabricated rule that breeds litigation, intrudes into local administration, and provides little benefit not already secured by another rule.

With intentional discrimination in jury selection on all suspect classifications barred by the Equal Protection Clause and with a remedy available to every defendant, what is left for the Sixth Amendment cross-section requirement? It is mostly cases such as this one, where benign practices are challenged in federal court on the ground that they had some incidental, unintended, marginal effect on the demographic composition of the venire. If the claim is unsuccessful, it consumes judicial resources that could have been spent on the many backlogged cases involving substantial claims of injustice. If the claim is successful, it means that every case tried to a jury then pending on appeal in the jurisdiction affected must be reversed for a reason having little or no bearing on the reliability of the guilt verdict. As a practical matter, the Court must ask whether the game of such litigation is "worth the candle." Cf. *Kansas* v. *Ventris*, 556 U. S. __, 129 S. Ct. 1841, 1846, 173 L. Ed. 2d 801, 808 (2009). As a doctrinal matter, the Court must ask whether *stare decisis* alone justifies the continuation of a constitutional requirement that was a transparent fiction from the beginning.

A. High Cost and Slim Benefit.

Given the complete absence of a textual or historical basis for the Sixth Amendment cross-section requirement, *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), must be seen as a pure policy decision. As such, it can be justified, if at all, only on the basis that its benefits exceed its costs. The benefits today are not what they were in 1975. The benefits today are only the benefits, if any, for the selection of juries that the cross-section rule provides but the now-robust Equal Protection Clause does not. Cf. *Montejo* v. *Louisiana*, 556 U. S. __, 129 S. Ct. 2079, 2090, 173 L. Ed. 2d 955, 969 (2009).

The present case illustrates the burden of litigation on the local government and on the judicial system. Five courts already have examined the Kent County Administrator's practices of assigning jurors to the district courts before the circuit courts and granting excuses to people who have problems with child care and transportation. See *Smith* v. *Berghuis*, 543 F. 3d 326, 331-333 (CA6 2008). No one suggests that there is anything inherently nefarious in these practices. The complaint is merely that the demographic composition of the resulting venires differs from the general population with "disparities . . . larger than could be accounted for by mere chance." *Id.*, at 332. So court after court must decide whether this constitutes a systematic exclusion within the meaning of *Taylor*. The state trial court says no; the state appellate court says yes; the state supreme court says no; the federal district court says no; the federal court of appeals says yes. See *id.*, at 333, 340-342. Now the Supreme Court of the United States must decide if the Kent County Administrator has violated the Nation's fundamental law by being excessively generous to single parents with child care problems.

All this judicial examination of local administrative minutia is for the purpose of enforcing a rule that is not really in the Constitution to begin with and has little or no impact on the fairness of the trial beyond what the Equal Protection Clause already requires. The notion that Smith's trial was unfair because about 6 percent of the veniremen were black when that figure "should" have been 7.28 percent, see *id.*, at 337, borders on absurd. See Brief for Petitioner 41.

While litigating a jury selection challenge in which the State ultimately prevails is a burden, a successful challenge is a disaster. A successful challenge results in a finding of "structural error," causing reversal with no showing whatever of any prejudice to the defendant. See *Vasquez* v. *Hillery*, 474 U. S. 254, 262 (1986); see also *Neder* v. *United States*, 527 U. S. 1, 8 (1999) (listing structural errors, including *Hillery*). Moreover, when the practice challenged is used in every trial in the jurisdiction, then every defendant who preserved the objection gets a new trial, again with no showing of prejudice whatever. If the boundaries of what is acceptable were crisply defined so that administrators knew in advance what practices were invalid, this might be a penalty worth imposing.[5] With the boundaries defined as vaguely as the present case illustrates, though, the penalty imposed on the local government is grossly disproportionate to the offense.

A vaguely defined constitutional rule with drastic consequences for violation may cause administrators to avoid getting anywhere close to the line, to the detriment of other important policy considerations. Had this Court not granted certiorari in the present case, the decision would have sent a message to administra-

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5. To this end, Petitioner proposes a 10% absolute disparity safe-harbor rule. See Brief for Petitioner 45.

tors nationwide that they must be stingy with hardship exemptions and tough on those who do not respond to the summons. See 543 F. 3d, at 341-342, and n. 5.

The downside of cracking down on single parents who are already struggling with being both breadwinner and caregiver by themselves is obvious. There is also a downside to aggressively dragging in those who ignore repeated notices to appear. As discussed in Part I, the common law ideal jury was "twelve good men and true." A sense of civic responsibility above the mean is a desirable quality in a juror. Subpar irresponsibility is an undesirable trait. Those who respond to the call to duty will, on average, have a greater sense of responsibility than those who have to be dragged to the courthouse. Having responsible jurors is more important to a fair trial for both parties than having a jury that precisely mirrors the composition of the community, cf. *Holland* v. *Illinois*, 493 U. S. 474, 483-484 (1990), but *Taylor*'s fabricated cross-section requirement places responsibility in a subordinate position. Another disadvantage of aggressive enforcement is simply the expense, which may have been the motivating factor in this case. Added expense at one point in the system will inevitably cause cutbacks somewhere else, such as greater pressure to plea bargain.

The cross-section requirement relieves the challenger of the burden of proving discriminatory intent in cases where discrimination is suspected but cannot be proved. Is the danger of hidden, unprovable discrimination so large as to justify the costs of this litigation? Perhaps it was in 1975, but America is a far different place today. Any group large enough to form a substantial share of the jury venire is large enough to wield significant political clout. Nearly half a century after the Voting Rights Act of 1965, the disenfranchised minority is history. See *Northwest Austin Municipal*

Util. Dist. No. One v. *Holder*, 557 U. S. __, 129 S. Ct. 2504, 2511, 174 L. Ed. 2d 140, 149 (2009) (noting historic accomplishments of the Voting Rights Act). The political consequences of discriminating against a minority group provide a greater disincentive to discriminate today than they did in times past and thereby reduce the need for extraordinary judicial intervention. Indeed, Kent County voluntarily changed the order of assignment of jurors to the district and circuit courts based on a mere perception of disparate impact, even though the perception turned out to be mistaken. See *supra*, at 3.

On a purely utilitarian basis, the costs of keeping *Taylor* exceed the benefits. The only reason for keeping it would be *stare decisis*.

B. Stare Decisis.

The criteria for deciding whether to overrule a precedent are familiar. They include the workability of the rule in light of subsequent experience, "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo* v. *Louisiana*, 129 S. Ct., at 2088-2089, 173 L. Ed. 2d, at 967. Also, precedents may be ripe for overruling "when subsequent cases have undermined their doctrinal underpinnings . . . ." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000).

As *Payne* v. *Tennessee*, 501 U. S. 808 (1991), demonstrates, workability is not limited to the literal sense of a rule being impossible to implement. It is sufficient that the rule "ha[s] defied consistent application by the lower courts." *Id.*, at 830. The fact that courts remain deeply divided on fundamental questions of determining representativeness 35 years after *Taylor*, see *supra*, at 21, demonstrates that *Taylor* meets the unworkability criterion as that term was used in *Payne*.

In terms of age, *Taylor* is neither antique nor recent. *Montejo* referred to the precedent at issue as "only two decades old." 129 S. Ct., at 2089, 173 L. Ed. 2d, at 967. At 35 years, *Taylor* is older than that but much younger than the century-old precedent overruled in *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 899 (2007). This factor is neutral.

No reliance interest at all inhibits the overruling of *Taylor*. In this respect, the case is exactly like *Montejo*. States that have implemented jury selection systems to sample a representative cross-section of the community may continue to do so if they wish. We can be confident that no one has committed a crime in reliance on the *Taylor* rule. Any defendant, including Smith, who asserted a Sixth Amendment claim instead of an equal protection claim in reliance on *Taylor* can be allowed to substitute the equal protection claim if he wishes. Cf. *Montejo*, 129 S. Ct., at 2091-2092, 173 L. Ed. 2d, at 970-971. This factor favors overruling.

The factor of whether the decision was well reasoned is covered in Part I, *supra*. *Taylor* created a constitutional requirement out of whole cloth that beyond question was not in the constitutional provision as originally understood. It did so when only a modest extension of the existing jurisprudence under a more applicable provision would have been sufficient to correct the problem.

Closely related to this factor is the inconsistency of *Taylor* with recent Sixth Amendment doctrine. This Court has recently required both the state and federal courts to make major changes in sentencing and evidence. In the sentencing area, a major reform enacted with a broad bipartisan consensus—an uncommon occurrence in the criminal law—was disrupted. See *United States* v. *Booker*, 543 U. S. 220, 297-298 (2005) (Stevens, J., dissenting) (discussing history of Sentenc-

ing Reform Act). This result was dictated by a line of cases that was based not on evolving ideas of enlightened policy but rather to insure that "the jury would . . . exercise the control that the Framers intended." *Blakely* v. *Washington*, 542 U. S. 296, 306 (2004). Similarly, in the admissibility of prior statements of a crime victim, recent attempts to relax the rules based on modern knowledge about domestic violence must yield to the conclusion of a historical examination of what the Confrontation Clause was understood to require at the time the Sixth Amendment was adopted. See *Davis* v. *Washington*, 547 U. S. 813, 822-826, 832-833 (2006).

How is it that the historical understanding can be controlling on these aspects of the Sixth Amendment and yet irrelevant on the cross-section requirement? If the Confrontation Clause cannot have "an *exception* . . . unheard of at the time of the founding or for 200 years thereafter," *Giles* v. *California*, 554 U. S. __, 128 S. Ct. 2678, 2693, 171 L. Ed. 2d 488, 506 (2008) (plurality opinion) (emphasis added); *id.*, 128 S. Ct., at 2694, 171 L. Ed. 2d, at 507 (Souter, J., concurring in part) ("as understood at the Framing"), how can the Jury Trial Clause have a *requirement* of similarly recent vintage, equally unknown in 1791? Can this Court legitimately turn the historical understanding on and off like a faucet, declaring it to be controlling in one case and irrelevant in the next?

Despite its deficiencies, *Taylor* v. *Louisiana* served a useful function in its day. It helped sweep away the last vestiges of laws that relegated women to a secondary place in society. That legal regime is now a distant and fading image in the rear-view mirror. Today, the *Taylor* cross-section rule is unnecessary for the enforcement of equality. It intrusively involves federal courts in details of local administration for no good purpose.

The litigation it breeds wastes scarce judicial resources better spent on more important matters. As a matter of constitutional legitimacy, the cross-section requirement can now be seen to be a fabrication, inconsistent with the recent jurisprudence that has restored the original understanding to its rightful place. It is time to give the *Taylor* rule a respectful burial and rely on the Equal Protection Clause alone as the foundation for protection against discrimination in jury selection.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

November, 2009

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

AMICUS CURIAE BRIEF

No. 08-1402

IN THE

Supreme Court of the United States

MARY BERGHUIS, Warden,

Petitioner,

v.

DIAPOLIS SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

VIRGINIA A. SEITZ
GARY FEINERMAN
JEFFREY T. GREEN
REBECCA K. TROTH
ANAND H. DAS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
CHRISTINA SWARNS*
JOHANNA B. STEINBERG
JIN HEE LEE
VINCENT M. SOUTHERLAND
MARY HUNTER
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200

Counsel for Amicus Curiae

* *Counsel of Record*

December 28, 2009

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF"), is a non-profit corporation formed to assist African Americans and other people of color who are unable, on account of poverty, to employ legal counsel to secure their rights through the prosecution of lawsuits. LDF has a long-standing concern with democracy, representation, fair jury service and selection, and the influence of racial discrimination on the criminal justice system. LDF has therefore represented defendants and/or served as *amicus curiae* in numerous jury underrepresentation and jury selection cases before this Court including, *inter alia*, *Amadeo* v. *Zant*, 486 U.S. 214 (1988); *Hobby* v. *United States*, 468 U.S. 339 (1984); *Ham* v. *South Carolina*, 409 U.S. 524 (1973); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972) and *Swain* v. *Alabama*, 380 U.S. 202 (1965).

LDF also pioneered the affirmative use of civil actions to end jury discrimination in *Carter* v. *Jury Comm'n of Greene County*, 396 U.S. 320 (1970), and *Turner* v. *Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in cases challenging the discriminatory use of peremptory challenges. *See Miller-El* v. *Dretke*, 545 U.S. 231 (2005); *Johnson* v. *California*, 545 U.S. 162 (2005); *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003); *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Edmonson* v. *Leesville Concrete Co., Inc.*,

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1 No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

500 U.S. 614 (1991); and *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

SUMMARY OF ARGUMENT

The right to a jury drawn from a fair and representative cross-section of the community is a core value of the Sixth Amendment and is essential to the integrity and legitimacy of the judicial system. By embodying the value of representative democracy, the fair cross-section requirement secures the right to a fair trial, guarantees that all members of distinctive groups in the community will play a role in the administration of justice, and allows citizens to serve as a check on the government. These are the issues at the heart of Respondent Diapolis Smith's case.

The United States Court of Appeals for the Sixth Circuit correctly found that Mr. Smith's Sixth Amendment right was violated after he was convicted by a jury in Kent County, Michigan, that was drawn from a pool from which African Americans were systematically excluded. Mr. Smith established that in the month his jury was selected, African Americans were 34 percent less likely to be in the venire pool relative to their jury-eligible percentage in the County. He also presented the uncontradicted testimony of Kent County officials who admitted that the County's established practice of "siphoning" prospective jurors away from its circuit court and to its district courts caused African Americans to be underrepresented in the circuit court venire pool, and that the practice was ultimately terminated because of those disparities.

Although this uncontested evidence proved that Kent County's jury-selection system violated Mr. Smith's Sixth Amendment rights, the Michigan Supreme Court rejected his claim by misapplying this

Court's fair cross-section precedents. Its decision was not only incorrect, but also objectively unreasonable under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

ARGUMENT

I. REPRESENTATIVE DEMOCRACY IS THE CENTERPIECE OF THE SIXTH AMENDMENT RIGHT TO A JURY CHOSEN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

A. The Value Of Representation In Jury Service

As explained by Respondent and supporting *amici*, *Duren* v. *Missouri*, 439 U.S. 357 (1979), is the culmination of this Court's long line of decisions emphasizing the unique constitutional importance of jury representativeness.[2] This Court has repeatedly recognized that all qualified segments of the population must have the opportunity to participate in the jury process. *See Smith* v. *Texas*, 311 U.S. 128, 130 (1940). Thus, "those eligible for jury service are to be found in every stratum of society," *Ballard* v. *United States*, 329 U.S. 187, 193 (1946), and the systematic exclusion from jury service of distinctive groups is "at war with our basic concepts of a democratic society and a representative government." *Smith*, 311 U.S. at 130; *see also Lockhart* v. *McCree*, 476 U.S. 162, 175 (1986) (explaining that the

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[2] In advancing this argument, *amicus curiae* does not assert that Mr. Smith has the right to a petit jury "of any particular composition." *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975). Rather, the Sixth Amendment fair cross-section right contemplates a "fair possibility" of a representative jury, which is satisfied by the "inclusion of all cognizable groups in the venire." *Holland* v. *Illinois*, 493 U.S. 474, 478 (1990) (citation and internal quotation marks omitted).

wholesale exclusion of women, African Americans and Mexican Americans "clearly contravened . . . the purposes of the fair-cross-section requirement"); *Apodaca* v. *Oregon*, 406 U.S. 404, 413 (1972) ("[T]he Constitution forbids . . . systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels," and groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined.").

Although "[t]he principle of the representative jury was first articulated by this Court as a requirement of equal protection," it long ago "emerged as an aspect of the [Sixth Amendment] . . . right to jury trial." *Peters* v. *Kiff*, 407 U.S. 493, 500 n. 9 (1972). Thus, in *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975), this Court made explicit that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."

Soon thereafter, in *Duren* v. *Missouri*, this Court established a three-part test for demonstrating a *prima facie* case of a Sixth Amendment fair cross-section violation. 439 U.S. at 357. Specifically, this Court stated that:

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364. Once the *prima facie* showing has been made, "it is the State that bears the burden of justifying [its infringement on the Sixth Amendment fair cross-section right] by showing attainment of a fair cross section to be incompatible with a significant state interest." *Id.* at 368.

B. *Duren*'s *Prima Facie* Test Secures The Goals Of The Sixth Amendment.

Each prong of *Duren*'s *prima facie* test furthers the purposes of the Sixth Amendment's fair cross-section requirement: "guard[ing] against the exercise of arbitrary power [by] mak[ing] available the commonsense judgment of the community as a hedge against . . . bias," *Taylor*, 419 U.S. at 530, "preserving 'public confidence in the fairness of the criminal justice system,' and implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'" *Lockhart* v. *McCree*, 476 U.S. at 174-75 (quoting *Taylor*, 419 U.S. at 530-31).

1. First Prong: Distinctive Groups

This Court has not "precisely define[d] the term 'distinctive group,'" but it has made clear that its meaning is "linked to the purposes of the [Sixth Amendment's] fair cross-section requirement." *Id.* at 174. Thus, women, African Americans and Mexican Americans have been properly designated distinctive groups because their exclusion offends the Sixth Amendment by undermining the legitimacy of the criminal justice system, denying the fundamental fairness guaranteed by an impartial jury trial, and removing a unique voice in the community from participation in the administration of justice. *Id.* at 175; *see also Peters*, 407 U.S. at 499-500, 503-04 (describing how exclusion of African Americans from

jury service thwarts the purposes served by the Sixth Amendment).[3]

2. Second Prong: Fair And Reasonable Representation

Because "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial," *Taylor*, 419 U.S. at 528, courts must ensure that the representation of distinctive groups in venires is "fair and reasonable" relative to their presence in the community. This is, by definition, a context-sensitive evaluation. Since distinctive group size and composition vary from county to county, the determination whether venire representation fulfills the Sixth Amendment's requirements must take into account all individual circumstances.

Thus, there is no "one size fits all" mathematical standard or formula for measuring the reasonableness of a distinctive group's representation

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[3] Petitioner's contention that smaller groups (groups that constitute less than 10% of the venire pool) are not "distinctive groups" for this purpose, Pet. Br. at 45-46, is wrong because it would eviscerate the fair cross-section requirement in most counties in this country and contravene the purposes of the requirement as set forth in *Duren* and *Taylor*. To the contrary, a group is distinctive whenever its exclusion implicates the Sixth Amendment. *See, e.g. Lockhart*, 476 U.S. at 174-75; *Peters*, 407 U.S. at 499-500, 503-04. Thus, federal courts of appeals determine whether a group is "distinctive" by examining whether "(1) [ ] the group is defined by a limiting quality (i.e., that the group has a definite composition such as by race or sex); (2) a common thread or basic similarity in attitude, idea, or experience runs through the group; and (3) [there is a] community of interests among members of the group such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process." *United States* v. *Green*, 435 F.3d 1265, 1271 (10th Cir. 2006) (gathering cases).

in venires. *See Alexander*, 405 U.S. at 630 (noting, in an equal protection case, that "[t]his Court has never announced mathematical standards for the demonstration of 'systemic' exclusion" of distinctive groups). Variations in population figures and factual scenarios have led federal appellate courts to consider different measures of representativeness depending on the size of the distinctive group. *See United States* v. *Weaver*, 267 F.3d 231, 242-243 (3d Cir. 2001) (considered facts to determine appropriate measure of representativeness); *United States* v. *Jackman*, 46 F.3d 1240, 1246-47 n.4 (2d Cir. 1995) (choosing measure of representativeness after considering facts).[4]

The most frequently used measures of representativeness are the absolute disparity and comparative disparity tests. "The absolute disparity test compares the members of a distinctive group that are jury eligible with those that appear on the

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[4] Many state supreme courts do the same. *See Washington* v. *People*, 186 P.3d 594, 605 (Colo. 2008) (en banc) (advancing argument that "all the statistical evidence presented" should be examined by a court facing a fair cross-section claim); *People* v. *Burgener*, 62 P.3d 1, 22 (Cal. 2003) (noting that the California Supreme Court has declined to adopt a particular measure of underrepresentation); *Azania* v. *State*, 778 N.E.2d 1253, 1260 (Ind. 2002) (applying both absolute and comparative disparity); *State* v. *Gibbs*, 758 A.2d 327, 336-37 (Conn. 2000) (explaining that the choice of proper statistical method is fact driven); *State* v. *Lovell*, 702 A.2d 261, 281 (Md. 1997) (advising Maryland state courts to use multiple measures and supplement absolute disparity figures with comparative disparity figures when the distinctive group population falls below 10 percent); *State* v. *Williams*, 525 N.W.2d 538, 543 (Minn. 1994) (validating reliance on multiple statistical measures of venire representation); *State* v. *Dixon*, 593 A.2d 266, 271 (N.J. 1991) (looking to multiple tests of underrepresentation in examining a fair cross-section and equal protection challenge to jury selection process).

venire." Pet. App. 18a. The difference between these two data - the distinctive group's jury eligible population figure and presence on the venire - is the absolute disparity. The comparative disparity standard, in contrast, measures the percentage by which the probability of serving on a jury venire is reduced for the members of the distinctive group. Comparative disparity is calculated by dividing the absolute disparity by the population figure of the distinctive group at issue. David Kairys, Joseph Kadane & John Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 790 (1977).

While the absolute disparity method may have some utility when the minority population is relatively large, the approach is of little value when applied to an underrepresented group that is a smaller percentage of the total population. Where, as here, the minority population comprises less than 10 percent of the population, the absolute disparity test, with a maximum allowable disparity of 10 percent, yields meaningless results. Underrepresentations of small and medium-sized minority groups would be validated under this approach because, by definition, a smaller group can never have a large absolute disparity. *See* Kairys, *supra*, 65 Cal. L. Rev. at 795-96. In such circumstances, applying the absolute disparity measurement improperly allows total exclusion of the minority group. *See United States* v. *Rogers*, 73 F.3d 774, 776-77 (8th Cir. 1996); *Jackman*, 46 F.3d at 1247. As the Sixth Circuit properly found below, the comparative disparity measurement is the "more appropriate measure of underrepresentation" where "the distinctive group alleged to have been underrepresented is small." Pet. App. 20a.

3. Third Prong: Systematic Exclusion

When the underrepresentation of a distinctive group is "inherent in the particular jury-selection process" used, it is deemed "systematic." *Duren*, 439 U.S. at 366. Fair cross-section claims, unlike equal protection claims, do not require proof of intentional discrimination. *See id.* at 368 n.26. Consistent with their distinct purposes, the Sixth Amendment focuses on exclusion caused by the jury selection process, while the Equal Protection Clause is concerned with intentional discrimination by government officials involved in the jury selection process. *See Castaneda* v. *Partida*, 430 U.S. 482, 492-94 (1977) (addressing equal protection challenge to intentional racial discrimination in selection of grand jurors); *Peters*, 407 U.S. at 499-500 (describing constitutional values offended by purposeful exclusion of African Americans from jury service). While racially-based exclusion from jury service may be relevant to finding a Sixth Amendment violation, intentional discrimination is not necessary to such a claim, and the "disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." *Duren*, 439 U.S. at 368 n. 26. The Michigan Supreme Court's decision must be evaluated within the context of this legal framework, which has been clearly established by this Court's precedent.

II. THE MICHIGAN SUPREME COURT'S DECISION CONTRAVENES THIS COURT'S FAIR CROSS-SECTION PRECEDENTS.

The Michigan Supreme Court properly identified *Duren*'s three-prong test as the standard for evaluating Mr. Smith's fair cross-section claim. Pet. App. 144a. Its determination that Mr. Smith failed to

prove a Sixth Amendment violation cannot, however, be reconciled with this Court's precedents.

A. The State Court Proceedings

Mr. Smith first raised his Sixth Amendment fair cross-section claim during jury selection for his Kent County Circuit Court trial. JA 3a-7a. The circuit court rejected Mr. Smith's claim, but, on appeal, the Michigan Court of Appeals remanded his case for an evidentiary hearing to determine whether his jury was drawn from a fair cross-section of the community. Pet. App. 176a.

At the evidentiary hearing, Mr. Smith, an African American, presented evidence that, although African Americans constituted 7.28 percent of the potential jurors in Kent County, Pet. App. 179a, 214a, his venire panel of 60 to 100 prospective jurors included, at most, three African Americans. JA 6a-7a. The parties examined 37 potential jurors during *voir dire*, all of whom were white. Pet. App 86a.

Dr. Michael Stoline, testifying as an expert statistician in support of Mr. Smith, established that in September 1993, the month of Mr. Smith's jury selection, African Americans were underrepresented by 34.8 percent, using a comparative disparity measure. JA 181a; Pet. App. 218a. In the six months preceding Mr. Smith's trial, African Americans were underrepresented by an average of 18 percent.[5] *Id.*

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[5] Dr. Stoline testified as to the number of African-American prospective jurors expected to appear on juror lists in each of the six months from April 1993 to October 1993. JA 217a. In the month that Mr. Smith's jury was selected, an unbiased selection process should have produced 11.5 African-American prospective jurors on the juror lists. *Id.* at 218a. Yet, under the County's selection process, one could expect to see only 7.5 African Americans for circuit court venires. This resulted in an

Through the uncontested testimony of Kim Foster, Kent County's Circuit Court Administrator, and Richard Hillary, Director of Kent County's Public Defender's Office and Co-Chair of the Jury Minority Representation Committee of the Grand Rapids Bar, Mr. Smith also presented evidence about the method of allocating prospective jurors to Kent County's 12 district courts and one circuit court. The circuit court is a court of general jurisdiction that presides over felony criminal cases, like Mr. Smith's case, throughout Kent County. By contrast, the district courts cover discrete geographic areas within the County and have limited criminal jurisdiction, hearing only misdemeanor criminal cases and preliminary criminal hearings.

Prior to October 1993, Kent County had a practice of filling the district courts' juror needs before assigning any prospective jurors to the circuit court panels. JA 20a, 22a; Pet. App. 8a. Thus, it was only after the 12 district courts received their prospective jurors that the remaining prospective jurors were made available for service in the circuit court. *Id.* The district courts used only prospective jurors who resided in their districts, while the circuit court used prospective jurors from throughout the County. Pet. App. 176a. Prospective jurors who were not selected for district court service were not returned to the circuit court jury pools. JA 64a – 65a.

Kent County jury selection officials admitted that this practice of assigning prospective jurors to district courts before the circuit court effectively "siphoned"

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estimated underrepresentation of four prospective African-American jurors (or 34.8 percent) from the 11.5 figure that would have occurred without the selection bias. *Id.* Further details on the statistical methods employed by Dr. Stoline can be found in Resp. Br. at 6-8.

jurors away from circuit court venire panels. Pet. App. 176a-77a, 168a. The qualified jurors siphoned away from the circuit court included residents of the City of Grand Rapids, which, at the time, was 18.5 percent African-American and contained 85 percent of Kent County's African-American population. JA 197a; Pet. App. 29a. As Mr. Foster, the circuit court administrator, testified, the "districts essentially swallowed up most of the minority jurors," leaving the circuit court with a jury pool that "did not represent the entire county." JA 22a.

Contrary to Petitioner's contention, Pet. Br. at 61, Kent County jury officials were unequivocal in their testimony that the systematic siphoning significantly reduced the number of African-American prospective jurors available to the circuit court jury pool. Indeed, Mr. Foster testified that one month after Mr. Smith's September 1993 jury selection, the County ended the siphoning practice because of the resulting racial disparities in the circuit court jury pool. JA 20a, 22a. He further noted that this change allowed the circuit court to access a "larger representation of the community [from which] to select [jurors]," thus remedying the "problem" of African-American underrepresentation. *Id.* at 22a. In addition, Mr. Hillary, the Co-Chair of the Jury Minority Representation Committee, testified that after "months of study," his committee "made a determination that we were losing minorities by choosing the District Court jurors first and not returning the unused ones to . . . the pool that the Circuit Court was [choosing its jurors] from." *Id.* at 64a-65a.[6]

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[6] As detailed in Resp. Br. at 48-50, Mr. Smith also presented evidence that Kent County's system of automatically accepting

At the conclusion of the evidentiary hearing, the Kent County Circuit Court found underrepresentation of African Americans in the circuit court venires, but ruled that there was no systematic exclusion, thus denying Mr. Smith's fair cross-section claim. Pet. App. 209a, 212a.

The Michigan Court of Appeals reversed the circuit court. In addition to holding that the "representation of blacks in venires from which juries were selected for Kent County Circuit Courts was at the time, i.e., before October 1, 1993, not fair and reasonable in relation to the number of such persons in the community," the court also held that "the evidentiary record establishes that the juror allocation system in place before October 1993 [siphoning] drained the largest concentration of African-Americans from the master jury list." *Id.* at 181a-182a. Thus, the court ruled that Mr. Smith was entitled to a new trial. *Id.* at 183a.

The Michigan Supreme Court reversed the Court of Appeals. Although the Michigan Supreme Court held that African Americans are a distinctive group under *Duren*'s first prong, *id.* at 159a, it ruled that Mr. Smith's "statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests." *Id.* at 146a. In reaching its result, the court appeared to treat the absolute disparity test[7] and other measurements of underrepresentation as equally valid, even though use of the absolute disparity test would have

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non-statutory excuses systematically excluded African American prospective jurors.

[7] The state court appears to have applied an absolute disparity test with a 10 percent threshold. This is consistent with Petitioner's recommendation in this case.

sanctioned the complete exclusion of African Americans from the jury pool. *See id.* The court then proceeded to give Mr. Smith the "benefit of the doubt" as to his claim of underrepresentation, and held that Mr. Smith had not demonstrated that African Americans were systematically excluded from Kent County's circuit court venires. *Id.* at 147a-49a, 169a-71a.

One concurring judge noted that the risks of using an absolute disparity measurement are "particularly acute when the percentage of the distinctive group eligible for jury service is small." *Id.* at 161a. He explained that in the instant case, "a complete exclusion of black jurors would result in only a 7.28 percent absolute disparity." *Id.*

B. The Michigan Supreme Court Erred In Holding That Mr. Smith Failed To Demonstrate Constitutionally Significant African American Underrepresentation.

In September 1993, the month of Mr. Smith's jury selection, African Americans were underrepresented by 34.8 percent, using a comparative disparity measure. JA 181a-182a; Pet. App. 218a; *see also supra* at 10. Although in the six months preceding his trial, African Americans were underrepresented by an average of 18 percent, many individual defendants, including Mr. Smith, faced even higher underrepresentation on their venires. The extent of the systematic underrepresentation on any particular venire impermissibly depended on the extent of the siphoning to district court juries at the given time. Thus, for example, in June 1993, the circuit court disparity spiked to 42.2 percent. *Id.* This demonstrated that African Americans were not fairly

and reasonably represented on Kent County Circuit Court venires relative to their size in the community.

Despite this evidence, the Michigan Supreme Court held that while Mr. Smith "presented some evidence of a disparity between the number of jury-eligible African-Americans and the actual number of African-American prospective jurors selected to the Kent County Circuit Court jury pool list," Pet. App. 146a, he failed to satisfy *Duren*'s second requirement. *Id.* In reaching this conclusion, however, the court improperly relied on the absolute disparity test, which produces unreliable results when used to measure disparities in smaller distinctive group populations, such as the African-American community in Kent County. *See Jackman*, 46 F.3d at 1247 (questioning validity of absolute disparity for smaller populations due to risk of selecting "a large number of venires in which members of the group are substantially underrepresented or even totally absent"); Kairys, *supra*, 65 Cal. L. Rev. at 793 (criticizing absolute disparity as an inappropriate measure for smaller populations).

At the time of Mr. Smith's trial, African Americans in Kent County comprised 7.28 percent of the adult population. JA 172a; Pet. App. 179a, 214a. The absolute disparity test was, therefore, an inappropriate method of measuring the reasonableness of African-American representation because that test would condone the *complete* exclusion of Kent County's African-American community in direct contravention of the Sixth Amendment's fair cross-section requirement. This Court and federal courts of appeals have acknowledged that such an outcome cannot be reconciled with this Court's fair cross-section precedents. *See e.g.*, *Taylor*, 419 U.S. at 530-31

(explaining that the purposes of a jury cannot be fulfilled when distinctive groups are excluded from the venire); *Rogers*, 73 F.3d at 776-77 (recognizing that absolute disparity insulates wholesale exclusion from challenge because "the percentage disparity can never exceed the percentage of [a distinctive group] in the community."); *United States* v. *Butler*, 615 F.2d 685, 686 (5th Cir. 1980) (clarifying circuit precedent by stating that in cases where a "less-than-10-[percent] minority" was at issue, other statistical measures would be considered); *United States* v. *Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980) (considering argument that "reliance on absolute disparity could lead to approving the total exclusion from juries of a minority that comprised less than ten percent of the population of the community" and avoiding speculation on the appropriate measure to confront such a situation). The Michigan Supreme Court thus erred in considering an absolute disparity analysis when evaluating Mr. Smith's evidence of African-American underrepresentation.

Given the size of Kent County's African-American population, comparative disparity was the only measure that could effectively evaluate the extent to which African Americans were underrepresented on Kent County circuit court venires. *See, e.g., Norris* v. *Alabama*, 294 U.S. 587, 596-97 (1935) (finding an equal protection violation in the total exclusion of African Americans from jury service in a jurisdiction where African Americans constituted less than eight percent of the relevant population). The results of a comparative disparity analysis lead to the inexorable conclusion that the underrepresentation of African Americans in the Kent County Circuit Court jury pool was constitutionally significant and satisfied *Duren*'s second prong. *See Rogers*, 73 F.3d at 777

(comparative disparity of more than 30 percent proves underrepresentation under *Duren's* second prong); *Ramseur* v. *Beyer*, 983 F.2d 1215, 1232 (3d Cir. 1992) (comparative disparity of 40 percent establishes underrepresentation).[8]

C. Kent County's Siphoning Of Prospective Jurors From The Circuit Court To The District Courts Systematically Excluded African Americans From Circuit Court Venires.

Although the Michigan Supreme Court recognized that "minority jury representation in Kent County has long been a problem," Pet. App. 156A, it concluded that African Americans were not systematically excluded from Kent County Circuit

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[8] Petitioner suggests that reliance on the comparative disparity test prevents fair cross-section violations only if the county "creates a self-conscious process" that "identif[ies] the race and ethnicity of every prospective juror," thereby "effectively requir[ing] a quota system." Pet. Br. at 43. This invocation of quotas is a red herring that this Court should ignore. First, as previously noted, comparative disparity is a legitimate and effective measure of representation endorsed by numerous courts and experts. Second, regardless of the method of proof, a quota is never a proper remedy for a Sixth Amendment fair cross-section violation. Quotas are applicable only to very limited circumstances involving demonstrated intentional discrimination. *See Parents Involved* v. *Seattle*, 551 U.S. 701, 795-796 (2007) (Kennedy, J., concurring) (describing the "allocation of benefits and burdens through individual racial classifications" as "sometimes permissible in the context of remedies" for a "*de jure*" wrong like "segregation"). Finally, both *Duren* and *Taylor* expressly state that the fair cross-section mandate does not require "that petit juries actually chosen must mirror the community," but rather must simply prevent the systematic underrepresentation of distinctive groups in jury pools. *Duren*, 439 U.S. at 364 n.20 (quoting *Taylor*, 419 U.S. at 538). That requirement is not a quota, and will not lead to one.

Court jury pools. This conclusion cannot be reconciled with this Court's precedents. Kent County's jury selection process systematically excluded African Americans by siphoning prospective jurors away from the circuit court and to the district courts. Accordingly, Mr. Smith satisfied *Duren*'s third prong.

As detailed above, 85 percent of Kent County's African-American population lived in Grand Rapids, which composes one of the 12 districts. As previously noted, it was Kent County 's practice to prioritize district courts over the circuit court for the assignment of prospective jurors, allowing only residents of the district in which the district court sits to serve on juries in that court. Also, prospective jurors were excused after district court service rather than returned to the jury pool for circuit court service. As a consequence, the district courts "siphoned" African Americans away from circuit court jury service. This process was "inherent" to Kent County's jury selection system, *see Duren,* 439 U.S. at 366, and resulted in the persistent underrepresentation of African Americans in circuit court venires, with 34 percent underrepresentation in the month of Mr. Smith's *voir dire*, an average of 18 percent underrepresentation over six months, and a high of 42 percent just two months before Mr. Smith's jury selection. JA 181a-82a; Pet. App. 218a.

Precise numbers documenting how many prospective African-American jurors were affected by this process were unavailable because the County chose not to collect race data.[9] However, as the Sixth

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[9] Petitioner is incorrect to the extent that it suggests that underrepresentation can be shown only by actual race data, as opposed to extrapolations from a data set such as the 1990

Circuit explained, it logically follows that the jury selection process resulted in "fewer African Americans [being] available to serve as jurors for county circuit court[ ]." Pet. App. 29a.

Moreover, the Kent County Circuit Court Administrator readily admitted that the siphoning used by Kent County to select circuit court jury pools at the time of Mr. Smith's trial systematically excluded African Americans. *See supra* at 12. Indeed, one month after Mr. Smith's September 1993 jury selection, the County ended the siphoning practice because it believed that siphoning caused unacceptable African-American underrepresentation in the circuit court jury pool. JA 20a, 22a. The Circuit Court Administrator noted that ending the siphoning practice allowed the circuit court to access a "larger representation of the community to select [jurors] from," thus remedying the "problem" of African-American underrepresentation. *Id.* at 22a.

The record also reflects that once the County terminated its siphoning practice, the racial disparities began to fade. Dr. Stoline's analysis included data covering the eleven months following Mr. Smith's jury selection, beginning in October 1993 when Kent County officials testified they discontinued siphoning African Americans away from the circuit court and towards the district courts. JA 20a, 22a. Using a method consistent with that used for his analysis of the prior six months, Dr. Stoline found that African Americans were underrepresented

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census. No court has so held; in fact, *Duren* expressly permitted the use of census data. *See Duren*, 439 U.S. at 364-65. Moreover, adoption of Petitioner's position would allow court administrators in communities with smaller, but sizeable, minority populations to foreclose fair cross-section challenges simply by choosing not to collect race data.

by 15.1 percent in the eleven-month post-siphoning period studied. *Id.* at 102a-03a. Extremely high levels of underrepresentation, similar to those occurring in the siphoning period, were concentrated in two of the first five months of the post-siphoning period: African Americans were underrepresented by 41.1 percent in the third month and 43.5 percent in the fifth month. *Id.* at 102a. These spikes appear to have faded away over time such that the highest African-American underrepresentation in the final six months of the eleven-month post-siphoning study was 22.2 percent, occurring in the penultimate month, and the average for the final six months was 15.1 percent. *Id.* These figures suggest that it took several months before the positive effects of the new non-siphoning system were reflected in the data. Petitioner's contrary suggestion, Pet. Br. at 50, 61, that the post-siphoning data somehow proves that the systematic removal of over three-quarters of the county's African Americans from the qualified pool never had any effect – is therefore baseless.

Despite this undisputed evidence, the Michigan Supreme Court held that the third *Duren* prong was not satisfied. This conclusion is incorrect and unreasonable because the practice of allocating prospective jurors to the district courts before the circuit court necessarily "siphoned" African Americans away from the circuit court, leaving a persistent and serious underrepresentation in that court. This logical inference is supported by testimony from institutional actors within the jury selection system, *see supra* at 11-12, and by the recommendation of the study committee that ended the practice, JA 64a-65a. This evidence has dispositive weight because it reflects the most pertinent and knowledgeable observations of the

effect of siphoning in Kent County's jury selection system. The Michigan Supreme Court's decision that Mr. Smith failed to establish systematic exclusion of African Americans is incorrect.

III. AEDPA DID NOT REQUIRE THE COURT OF APPEALS TO IGNORE KENT COUNTY'S CONSTITUTIONAL VIOLATION.

As shown above, the Michigan Supreme Court erred in rejecting Mr. Smith's Sixth Amendment fair cross-section claim. Under AEDPA, however, a federal court may not grant *habeas* relief merely because it believes, in its own "independent judgment," that the state court "erroneously or incorrectly" decided a federal constitutional claim. *Williams* v. *Taylor*, 529 U.S. 362, 411 (2000) (O'Connor J., concurring). Rather, a federal *habeas* court must determine that the decision was an "objectively unreasonable" application of "clearly established" United States Supreme Court law, as properly held by the Sixth Circuit below. *Id.* at 409 (O'Connor, J., concurring).

The phrase "clearly established law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* at 365. "[R]ules of law may be sufficiently clear for *habeas* purposes even when they are expressed in terms of a generalized standard rather than a bright-line rule." *Id.* at 382. States are bound by clearly established law regardless whether it is expressed in general or specific terms, and state court decisions applying such law must be reasonable.

AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a

legal rule must be applied." *Carey* v. *Musladin*, 549 U.S. 70, 80-81 (2006) (Kennedy, concurring). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (citing *Williams*, *supra*). Thus, "[i]f the state court's adjudication is dependent on an antecedent unreasonable application of federal law, . . . the federal court must then resolve the claim without the deference AEDPA otherwise requires." *Id.* at 931 (citing *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003)); *see also Williams*, 529 U.S. at 412 (O'Connor, J., concurring).

For the reasons detailed below, the Sixth Circuit properly applied this precedent and determined that while the Michigan Supreme Court "identifie[d] the correct governing legal principle from this Court's decisions," it "unreasonably applie[d] that principle to the facts of [Mr. Smith's] case." *Williams*, 529 U.S. at 412.

A. The Michigan Supreme Court Was Objectively Unreasonable In Determining That African Americans Were Not Underrepresented To A Constitutionally Significant Degree In Kent County's Circuit Court Venire Pool.

1. The Sixth Amendment's Fair Cross-Section Requirement Is Clearly Established Law.

In applying *Duren*'s first step, the Michigan Supreme Court correctly ruled that African Americans constituted a distinctive group under the Sixth Amendment's fair cross-section requirement. With respect to *Duren*'s second step, the Michigan Supreme Court concluded that because each of the various measures of representation had shortcomings, it would "consider all these approaches to measuring whether representation was fair and reasonable." Pet. App. 146a. This is an accurate recitation of this Court's clearly established law.

Because the degree of underrepresentation necessary to implicate these Sixth Amendment concerns and to satisfy *Duren*'s second step will naturally vary with the size of the distinctive group and the size of the counties from which the venires are drawn, *Duren* requires exactly such a case-specific approach. Thus, the Michigan Supreme Court properly identified this Court's clearly established law.

The fact that *Duren*'s assessment of "fair and reasonable representation" must be conducted on a case-by-case basis does not mean that the test lacks the specificity necessary to constitute clearly established law under AEDPA. To the contrary, as detailed in Respondent's Brief at 55-57, *Duren*'s test

is analogous to the *Strickland* v. *Washington* test, *see* 466 U.S. 668, 688-89 (1984), for assessing the effective assistance of counsel – it is the type of clearly established rule "which of necessity requires a case-by-case examination of the evidence," and can therefore "tolerate a number of specific applications without saying that those applications themselves create a new rule." *Williams*, 529 U.S. at 382 (quoting *Wright* v. *West*, 505 U.S. 277, 308-09 (1992)). The *Duren* test is a clear standard that must be reasonably applied by the state courts.

In arguing that *Duren*'s test is too general to constitute clearly established law, Petitioner cites *Wright* v. *Van Patten*, 552 U.S. 120 (2008), and *Carey*, 549 U.S. at 70. *See* Pet. Br. at 35-36. These decisions are, however, inapplicable to Mr. Smith because they involve attempts to extend Supreme Court law to novel ground. In *Carey*, this Court rejected the Ninth Circuit's attempt to extend the clearly established law governing state-sponsored courtroom practices to private spectator conduct, an application not previously contemplated by this Court. *See* 549 U.S. at 654. And in *Wright*, this Court found the state court's application of federal law to be reasonable where "[n]o decision of this Court squarely addresse[d] the issue in this case." *Wright*, 552 U.S. at 125, *see also Knowles* v. *Mirzayance*, -- U.S. --, 129 S.Ct. 1411, 1419 (2009) (no unreasonable application of clearly established law where "[t]his Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims"); *Schriro* v. *Landrigan*, 550 U.S. 465, 478 (2007) (no unreasonable application of clearly established federal law where "we have never addressed a situation like this." (internal citation omitted)). This

authority is irrelevant to Mr. Smith because he did not seek to extend Supreme Court law to a new context. The fact that the federal courts of appeal and state supreme courts agree with Mr. Smith that *Duren* requires a case-specific approach to measuring underrepresentation further demonstrates that Mr. Smith is not seeking to apply Supreme Court law to a different, and unanticipated, circumstance. *See* Resp. Br. at 27-30.

2. The Michigan Supreme Court's Unreasonable Application Of Clearly Established Law.

After properly identifying this Court's clearly established law, the Michigan Supreme Court unreasonably applied it to the facts of Mr. Smith's case. The court concluded that Mr. Smith "presented some evidence of a disparity between the number of jury-eligible African Americans and the actual number of African-American prospective jurors selected to the Kent County Circuit Court jury pool list." Pet. App. 146a. It then declared, however, that:

> [D]efendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests. Nevertheless, rather than leaving the possibility of systematic exclusion unreviewed solely on the basis of defendant's failure to establish underrepresentation, we give the defendant the benefit of the doubt on underrepresentation and proceed to the third prong of the Duren analysis.

Id. at 146a-47a. Although this ruling is not a model of clarity, AEDPA controls here because the Michigan Supreme Court held that Mr. Smith failed to meet his *prima facie* burden under *Duren*'s second prong. *See*

28 U.S.C. § 2254(d). That decision was objectively unreasonable.

As previously noted, at the time of Mr. Smith's trial, African Americans comprised 7.28 percent of Kent County's adult population. Under these circumstances – which are analogous to those prevailing in the vast majority of African-American communities throughout the country, *see* Brief for Social Scientists, Statisticians, and Law Professors, Jeffrey Fagan, *et. al.*, as *Amici Curiae* Supporting Respondent – the Sixth Amendment can tolerate only a limited degree of African-American exclusion and underrepresentation before implicating the Sixth Amendment's fair cross-section requirement. Thus, in order to apply *Duren* and this Court's other fair cross-section precedents reasonably, the state court should have recognized that relying on an absolute disparity measurement would have improperly allowed the total exclusion of Kent County's African-American population from its jury venires.

The Michigan Supreme Court ignored this constitutionally significant fact. Although it properly acknowledged that *Duren* required a case-specific analysis and that the absolute disparity test "produces questionable results . . . where the members of the distinctive group comprise a small percentage of those eligible for jury service," Pet. App. 145a, the state court nonetheless gave equal consideration to the results of an absolute disparity analysis in evaluating Mr. Smith's evidence of underrepresentation. Because the absolute disparity test would permit the total exclusion of Kent County's African-American community from venires, the state court's application of *Duren* was objectively unreasonable.

Furthermore, the state court unreasonably applied *Duren* by undervaluing Mr. Smith's comparative disparity evidence. Mr. Smith demonstrated that African Americans were underrepresented by 34.8 percent in the month of his jury selection. As the Sixth Circuit found, this is "sufficient to demonstrate that the representation of African-American veniremen in Kent County at the time of [Mr. Smith's] trial was unfair and unreasonable." Pet. App. 21a (citing *Rogers*, 73 F.3d at 777).

For these reasons, the Michigan Supreme Court's judgment was objectively unreasonable under AEDPA in concluding that Mr. Smith failed to demonstrate that African Americans were underrepresented on Kent County Circuit Court venires.

B. The Michigan Supreme Court Was Objectively Unreasonable In Determining That African Americans Were Not Systematically Excluded From Kent County's Circuit Court Venire Pool.

Duren's third step requires proof that the underrepresentation is "due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364. The Sixth Circuit correctly held that the Michigan Supreme Court unreasonably applied *Duren* in finding no systematic exclusion in Kent County's practice of siphoning jurors away from the circuit court to district courts. Pet. App. 41a-42a.

The "systematic exclusion" analysis focuses on the identification of processes integral to the jury selection system that may have caused persistent underrepresentation of distinctive groups, and must be conducted independent of *Duren*'s other steps. *See, e.g., Weaver*, 267 F.3d at 241 ("strength of the

evidence should be considered under the second prong, while the nature of the process and the length of time of underrepresentation should be considered under the third"); *Ford* v. *Seabold*, 841 F.2d 677, 685 & n.6 (6th Cir. 1988) ("Although the frequency of the selection of jury venires is not, of itself, helpful in establishing underrepresentation under the second prong of the prima facie case, it is of crucial significance in establishing that any existing exclusion was systematic."). Accordingly, the persistence of African-American underrepresentation of 18 percent[10] over a six-month period supports the systematic nature of their exclusion from the qualified circuit court jury pool. *See Duren*, 439 U.S. at 367 ("The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which juries were selected.").[11]

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[10] The *persistence* of the 18 percent underrepresentation over the course of six months, which satisfies *Duren*'s third step, is separate from the *degree* of the 34 percent underrepresentation during the month of Mr. Smith's jury selection, which satisfies *Duren*'s second step. To conflate these two analyses would make either the second or third step superfluous. *See Paredes* v. *Quarterman*, 574 F.3d 281, 290 (5th Cir. 2009) ("[Petitioner] repeats his position that a large discrepancy exists but does not explain how that second-prong statement alone satisfies the requirements of the third prong, which requires an independent showing that the discrepancy is systematic. If any discrepancy sufficient to satisfy the second prong would also satisfy the third, the third inquiry would be superfluous.").

[11] Despite this Court's clearly established law that no discriminatory intent is required in fair cross-section cases, *See supra* at 9, Petitioner attempts to inject an intent requirement into *Duren*'s concern with the systematic underrepresentation of distinctive groups. Pet. Br. at 44. In fact, *Duren* instructs only that the exclusion be "inherent in the particular jury-selection process utilized." *Duren*, 439 U.S. at 366. As explained in

The Michigan Supreme Court's analysis of "systematic exclusion" was fundamentally flawed, and thus objectively unreasonable, because it ignored pertinent, uncontested evidence of Kent County's siphoning procedure and imposed a burden of proof that exceeded *Duren*'s mandate for establishing a *prima facie* case of a fair cross-section violation.

In rejecting Mr. Smith's claim of systematic exclusion resulting from the siphoning procedure, the Michigan Supreme Court held that he had "failed to carry his burden of proof" because the "record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool."[12] Pet. App. 147a. The state court's summary conclusion directly contradicts the evidence in the record. The uncontested testimony of Kent County jury officials and the results of a bar study committee both showed that the siphoning procedure was a significant source of African-American underrepresentation in circuit court venire panels, which led Kent County to terminate this practice in

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Section II(C), *supra*, Kent County's siphoning practice meets that test because it was part of the jury selection system and caused the underrepresentation of African Americans in Kent County's circuit court jury pool. Under this Court's precedent, ignoring the discriminatory *effect* of the siphoning and demanding evidence of a discriminatory *purpose* would plainly be unreasonable.

[12] The concurring opinion further commented that "after Kent County stopped selecting district court jurors first, the change in the representation of black jurors in circuit court was small, suggesting that the alleged systematic exclusion was not the cause of the underrepresentation." Pet. App. 169a. However, as noted in Section II(C), *supra* at 19-20, the record suggests that it took several months for the effects of terminating the siphoning procedure to be reflected in the jury pool data.

October 1993. There was no contrary evidence in the record. *See supra* at 18-20.

The state court's understanding of Mr. Smith's burden of proof under *Duren* was also objectively unreasonable. The State in *Duren*, like Petitioner here, argued that there was no proof "that the exemption for women had 'any effect' on or was responsible for the underrepresentation of women on venires." 439 U.S. at 368. This Court, however, determined that *Duren*'s third step was satisfied by evidence that the exemption for women was "inherent in the particular jury-selection process utilized," thus shifting the burden to Petitioner to "demonstrate that [other] exemptions caused the underrepresentation complained of." *Id.* at 366, 368. The same response is warranted here, where the officials in the best position to provide information about Kent County's jury selection system testified that the siphoning procedure systematically excluded African Americans from the qualified circuit court jury pool. *See* Section II(C), *supra*. The Michigan Supreme Court's imposition of a higher burden of proof is an objectively unreasonable application of *Duren*.[13] *See Davis* v. *Warden*, 867 F.2d 1003, 1014 (7th Cir. 1989) ("The Supreme Court . . . and other courts have recognized that defendant should not be expected to

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[13] Contrary to Petitioner's assertions (Pet. Br. at 60), 28 U.S.C. § 2254(e) has no relevance here because Mr. Smith seeks *habeas* relief under 28 U.S.C. § 2254(d)(1). Section 2254(e) governs state court factual findings, and Mr. Smith does not take issue with the facts found by the Michigan Supreme Court. Instead, he challenges that Court's *application of law to those facts* and, thus, contends that the court's ruling of no evidentiary support for "systematic exclusion" was an "unreasonable application of" *Duren*'s third prong under Section 2254(d)(1).

carry a prohibitive burden in proving underrepresentation." (citations omitted)); *cf. Johnson*, 545 U.S. at 170 (*prima facie* case of *Batson* violation established by "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

VIRGINIA A. SEITZ
GARY FEINERMAN
JEFFREY T. GREEN
REBECCA K. TROTH
ANAND H. DAS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
CHRISTINA SWARNS*
JOHANNA B. STEINBERG
JIN HEE LEE
VINCENT M. SOUTHERLAND
MARY HUNTER
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Amicus Curiae
** Counsel of Record*

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AMICUS CURIAE BRIEF

No. 08-1402

IN THE
Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

v.

DIAPOLIS SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL JURY PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT DIAPOLIS SMITH

JOSHUA DRATEL
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L ST., N.W.
12TH FLOOR
WASHINGTON, DC 20036
(202) 872-8600

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004
(212) 549-2500

CLIFFORD M. SLOAN
Counsel of Record
NEIL LOMBARDO
RAY D. MCKENZIE
PATRICK HAGGERTY
1440 NEW YORK AVE., N. W.
WASHINGTON, D. C. 20005
(202) 371-7000

THOMAS M. MEYER
NATIONAL JURY PROJECT
2831 TELEGRAPH AVE.
OAKLAND, CA 94609
(510) 524-6568

Attorneys for Amici Curiae

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The National Association of Criminal Defense Criminal Lawyers ("NACDL"), the American Civil Liberties Union ("ACLU"), and the National Jury Project ("NJP") respectfully submit this brief as *amici curiae* in support of respondent Diapolis Smith.[1]

STATEMENTS OF INTEREST

The NACDL, founded in 1958, is a non-profit corporation with more than 12,000 direct members nationwide and in 28 countries, and more than 40,000 affiliate members in 90 state, provincial and local affiliate organizations. NACDL members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving jury composition and ensuring that juries are comprised of a fair cross-section of the community. In furtherance of its objectives, the NACDL files approximately fifty *amicus curiae* briefs each year,

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed with the Clerk, *amici curiae* have permission of all parties to file.

in this Court and others, addressing a wide variety of criminal justice issues.

The ACLU is a non-profit, nonpartisan national organization. The ACLU is dedicated to preserving the principles of liberty and equality embodied in the Constitution and the civil rights laws of this country.

The NJP is a non-profit corporation established in 1975 for the purpose of studying all aspects of the American jury system and maintaining and strengthening that system. The NJP has offices in Philadelphia, Pennsylvania, Minneapolis, Minnesota, and Oakland, California, providing consultative and educational services to attorneys and social science professionals in criminal and civil litigation in federal and state courts throughout the United States.

INTRODUCTION AND SUMMARY

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. This requirement of "an impartial jury" is a core American constitutional value. As this Court explained more than three decades ago, "an impartial jury" requires that the jury be representative of the community—that it "must be drawn from a fair cross-section of the community . . . ." *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). This recognition implements the Sixth Amendment's

impartial jury guarantee; it furthers paramount constitutional protections; it promotes accurate, unbiased, and reliable adjudications that instill confidence in our criminal justice system; it has deep historic roots; and it has worked well as a sound rule in the administration of criminal justice.

In support of Petitioner, *amicus* Criminal Justice Legal Foundation now asks this Court to jettison settled precedent and eviscerate the Sixth Amendment's "impartial jury" guarantee by overruling *Taylor* and *Duren*. Such a radical and abrupt departure is neither necessary nor appropriate. It would fly in the face of the Sixth Amendment's fundamental protection, it would injure important constitutional values, and it would harm the administration of criminal justice by undermining both the jury's legitimacy and the corresponding legitimacy of its verdicts. *Taylor* and *Duren* are sound and important precedents; they are essential to the Sixth Amendment, and should not be rejected or abandoned by this Court.

For the reasons stated by Respondent, the Sixth Circuit's decision should be affirmed. *Amici* submit this brief to emphasize that *Taylor* and *Duren*, and the fair cross-section requirement they explicate, are indispensable in implementing the fundamental constitutional guarantee of "an impartial jury."

ARGUMENT

I. The Requirement of A Representative Jury Is a Fundamental Constitutional Value.

From the nation's earliest days, Americans have believed the right to a representative jury to be of the highest importance.

Even before achieving independence, Americans emphasized this principle. Various forms of the right to a trial by one's peers were included in foundational documents for the colonies. [2] The Declaration of Independence, moreover, lists the denial of trial by jury as one of the abuses compelling separation from England. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 875 (1994).

The First Continental Congress, in turn, stressed the importance of the jury by declaring that "the respective colonies are entitled to . . . the great and

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[2] The right to a jury trial was guaranteed by King James I's Instructions for the Government of the Colony of Virginia drafted in 1606; the Massachusetts Body of Liberties adopted in 1641; the Concessions and Agreements of West New Jersey of 1677; the Frame of Government of Pennsylvania of 1682; the Declaration of Rights of the First Continental Congress of 1774; the Constitution of Virginia of 1776; the Declaration of Independence, and the first constitutions of most states. Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501, 507-08 (1986).

inestimable privilege of being tried by their peers of vicinage, according to the court of [common] law." Jon Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 6 (1977) (quoting Declaration of Rights of the Continental Congress (1774), Article 5 (*reprinted in* Charles C. Tansill, ed., House Document No. 398, 69th Congress, 1st Session (Washington: Government Printing Office, 1927), p. 3)).

The Constitution's ratification debates reflect the vital necessity of ensuring that juries be representative of the community. In the run-up to the pivotal Virginia ratification debate, Richard Lee emphasized the role of the jury as a democratic institution:

> It is essential in every free country that *common people* should have a part and share of influence, in the judicial as well as in the legislative department. . . . The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion and influence, and the wisest and most fit means of protecting themselves in the community. Their situation as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society, and to come forward, in turn, as the centinels and guardians of each other.

Van Dyke, *supra*, at 46-47 (quoting Richard Henry Lee, "Letters of a Federal Farmer", Letter IV, Oct. 12, 1787, in *Pamphlets on the Constitution of the United States* 316 (Paul Leicester Ford ed., 1968)).

The explicit inclusion of the right to "an impartial jury" as a core guarantee in the Bill of Rights vividly demonstrates the importance of this principle. The "impartial jury" right is included in the same Amendment that provides such fundamental protections as "a speedy and public trial," the right to counsel, and the right to confront one's accusers; like those protections, it reflects a quintessential American value. Along with those other Sixth Amendment rights, an impartial jury enhances the accuracy and reliability of verdicts, as well as the public's confidence in the fairness of proceedings.

Indeed, the role of juries was deemed so essential to our system of government that guarantees of various aspects of trial by jury were referenced in three separate amendments in the Bill of Rights. *See* U.S. Const. amends. V (right to be indicted by a grand jury in felony cases), VI (right to an impartial jury in criminal cases) and VII (right to a jury in civil matters).

Soon after ratification of the Bill of Rights, the paramount role of impartial juries in the American system of justice and democracy continued to be emphasized. Thomas Jefferson, for example, raised the topic in his first inaugural address. Jefferson stressed that "trials by juries *impartially selected*" represent one of the cornerstones of our system. Van Dyke, *supra*, at 46-47 (quoting *Messages and Papers*

of the Presidents 323-24 (James D. Richardson, ed. 1876)) (emphasis added).

Long before *Taylor* and *Duren*, this Court emphasized the importance of representative juries as an essential element of the Sixth Amendment's impartial jury guarantee. In *Strauder v. West Virginia*, 100 U.S. 303 (1879), for example, the Court defined the criminal jury as a body "composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id.* at 308.

This Court has consistently explained that an impartial jury is, of necessity, a broadly representative one. In *Smith v. Texas*, 311 U.S. 128 (1940)—a case decided 35 years before *Taylor*—this Court addressed a claim that African Americans had intentionally been excluded from grand juries. In upholding the challenge, the Court emphasized the historical basis for the requirement that a jury be representative of the community: "It is part of the established tradition in the use of juries . . . that the jury be a body truly representative of the community." *Id.* at 130.

The Court explained that it is only when juries represent the entire community that they can function as true "instruments of public justice." *Id.* Stressing the crucial role that representative juries play in our society, the Court added that "the exclusion from jury service of otherwise qualified groups not only violates our Constitution . . . but is at war with our basic concepts of a democratic

society and a representative government." *Id.* This analysis of grand juries, of course, applies to trial juries with at least equal force.

The Court renewed and expanded its commitment to representative juries only two years later. In *Glasser v. United States*, 315 U.S. 60 (1942), the Court confronted a claim by a defendant that he had been denied his Sixth Amendment right to an impartial jury. The defendant claimed that the only women on the venire were members of the League of Women Voters who had attended "jury classes whose lecturers presented the views of the prosecution." *Id.* at 83-84. The Court condemned "the deliberate selection of jurors from the membership of particular private organizations" because it rendered the jury "the organ of a special class," and "openly partisan." *Id.* at 86. Significantly, the Court also expressly recognized that drawing potential jurors from "*a cross-section of the community*" is the only sure method of guaranteeing the right to an impartial jury. *Id.* (emphasis added). The Court proceeded to note that "a 'body truly representative of the community'" is vital to the proper functioning of the jury system, and it characterized "trial by a representative group" as an "essential right." *Id.*

Four years later, the Court again affirmed its belief that only juries drawn from a cross-section of the community pass constitutional muster. In *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), the Court addressed a civil litigant's challenge to the jury selection procedures in federal court. *Id.* at 219. Speaking in terms equally applicable to criminal juries, the Court explained that "[t]he American tradition of trial by jury, considered in connection

with either criminal or civil proceedings, necessarily contemplates *an impartial jury drawn from a cross-section of the community.*" *Id.* at 220 (emphasis added).

The Court recognized that individual juries cannot be expected to include representatives of every group in a community, but emphasized that "those eligible for jury service are to be found in every stratum of society," and that to disregard this imperative would "open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Id.*

In subsequent opinions, the Court continued to validate the cross-section requirement as an essential element of an impartial jury. In *Brown v. Allen*, 344 U.S. 443 (1953), for example, the Court considered a challenge to a state-court criminal conviction on equal protection and due process grounds. *Id.* at 465. The defendant argued that the state's practice of developing jury lists solely from tax records constituted discrimination because it led to the under-representation of African Americans. *Id.* at 467-68.

In rejecting the claim, the Court explicitly recognized that state-devised lists for jury service must "reasonably reflect[] a cross-section of the population suitable in character and intelligence for [jury] duty." *Id.* at 474. Like other decisions of this Court, *Brown* thus makes clear that the cross-section requirement is integral to ensuring a fair trial.

After it found the Sixth Amendment applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court continued to emphasize the

importance of the cross-section requirement. For example, in *Williams v. Florida*, 399 U.S. 78 (1970), the Court rejected a challenge to Florida's practice of empanelling criminal juries of only six members. In doing so, however, the Court once again stressed that petit juries must "provide a fair possibility for obtaining a representative cross-section of the community." *Id.* at 100.

Against this background, the Court in 1975 confronted a constitutional challenge based on a system that had the effect of excluding most women from jury eligibility. *Taylor*, 419 U.S. at 524. Justice White's opinion for the Court explained that, under this Court's existing precedents, "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial," *id.* at 528, and thus the exclusion was unconstitutional.

The Court further explained that the fair cross-section requirement is "fundamental" and has "a solid foundation," and added that the Sixth Amendment guarantee is not protected "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Id.* at 530. The Court was not breaking new ground; rather, it was enforcing the central Sixth Amendment guarantee of "an impartial jury," which ensures that the jury is representative of the community.

Similarly, in *Duren v. Missouri*, 439 U.S. 357 (1979), the Court again reaffirmed the importance of a jury drawn from a fair cross-section of the community in order to implement the Sixth

Amendment's guarantee of an "impartial jury." The Court explained that, to demonstrate a Sixth Amendment violation, a defendant must establish a prima facie case by showing that a distinctive group was under-represented in the venire because it was systematically excluded from the jury-selection process, and that the state is unable to justify that exclusion with a significant state interest. *Id.* at 364. The Court again emphasized the settled right of "a criminal defendant . . . to a petit jury selected from a fair cross section of the community" as an essential element of the "Sixth and Fourteenth Amendments." *Id.* at 359.

Most recently, in *Holland v. Illinois*, 493 U.S. 474 (1990), the Court again stressed the importance of the fair cross-section requirement, while recognizing that this requirement "obviously is not explicit in [the] text [of the Sixth Amendment] . . . ." *Id.* at 480. In *Holland*, the Court determined that the petitioner, a Caucasian, had standing to raise a Sixth Amendment challenge because African Americans were excluded from his jury. *Id.* at 476.

Speaking for the Court, Justice Scalia explained that the cross-section requirement "is derived from the traditional understanding of how an 'impartial jury' is assembled. That traditional understanding includes a representative venire, so that the jury will be . . . 'drawn *from* a fair cross section of the community.'" *Id.* at 480 (quoting *Taylor*, 419 U.S. at 527) (emphasis in original).

The foregoing makes clear that, from the earliest days of this nation, an impartial jury, representative of the community or one's peers, has been viewed as

essential to American liberty and democracy. This Court has consistently recognized and protected this bedrock principle. The requirement of a representative jury has long been honored as an indispensable means of ensuring that the jury reflects the full variety of attitudes and human experience that comprise the larger community—an critical element of fairness in the criminal justice system, and of democratic participation in the judicial process.

II. The Importance of a Representative Jury Has Deep Historic Roots.

The overarching importance of ensuring that criminal juries reflect the views of the larger community was recognized well before the concept of representativeness assumed its central role in the American experience. From its earliest origins, the jury has been understood as a representative body that brings the community's sense of justice to bear on criminal matters. This view is a necessary consequence of the fundamental purpose served by a criminal jury—to deliver a verdict that will be accepted as just and impartial both by the parties and the community at large. *See generally Powers v. Ohio*, 499 U.S. 400, 413 (1991) ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.").

The concept of representativeness has always been essential in the character of the criminal jury. Even jury systems in ancient times reflected a belief

that representativeness is essential if the jury's verdict is to be accepted by the community as impartial and fair. In ancient Egypt, for example, a jury that tried minor charges against workmen was required to be comprised of equal numbers of individuals from both sides of the Nile. *See* Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* 4 (1973). Criminal juries in ancient Athens were even more democratic—all citizens at least 30 years of age were eligible to serve, provided they were not indebted to the state. *Id.* at 2. Similarly, in Scandinavian and Teutonic judicial proceedings, such as the Norse *Thing* and the German *Mallum*, all citizens were initially entitled to participate. *See* William Forsyth, *History of Trial by Jury* 4, 7 (1852). These assemblies were eventually limited to "representatives of the community," presumably when growing populations made the process too cumbersome. *Id.* at 7.

It was no different in the Anglo-Saxon tradition. In their earliest form, English juries functioned like modern grand juries, deciding only whether the accused should stand trial.[3] *See* Charles L. Wells, *The Origin of the Petty Jury*, 27 L. Q. Rev. 347 (1911). These grand juries were comprised of twelve higher-ranking men selected from the hundred, or district, in which the offense had been committed, "and represented the voice of the hundred in making the

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[3] The test of the accused's guilt or innocence was by some other means, such as trial by ordeal. Wells, *supra*, at 347.

accusation."[4] Wells, *supra*, at 357; *see also* Moore, *supra*, at 38-39 (1951). These juries were supplemented with representatives from the "vills," or townships, immediately adjacent to where of offense had occurred. Wells, *supra*, at 354. The representatives of these neighboring townships were commoners, and their involvement in the process reflected a clear understanding of the significance of ensuring that juries represent of all segments of the community.[5] As one commentator described the early English jury system:

> [T]he essential feature of the whole [jury] system, then as now, is that it is as a representative body that the jury is called upon for a verdict. It represents, that is, the common voice, or the common sense of the community, and that is why having a jury was called 'putting oneself on the country'.

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[4] In fact, the grand jury's precursor was well established in England before this time. But the importance of representativeness was evident even then, as grand jurors were comprised of individuals who represented the community's stake in the matter, and who provided a decidedly local assessment of the charges. William Stubbs, *The Constitutional History of England* 175 (1979).

[5] As one commentator notes, the involvement of these commoners would become important when juries were later called upon to decide actual guilt or innocence: "Representatives of the vill came to play a crucial role: their assent was typically required for a conviction." *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, 362-63 (J.S. Cockburn and T.A. Green eds., 1988).

Wells, *supra*, at 354.

These early juries were self-informing, meaning that they either had direct knowledge of the allegations or investigated the allegations themselves. Moore, *supra*, at 39. Juries thus were initially delegates of their communities, called upon to investigate and resolve disputes among their own. Wells, *supra*, at 355 ("[Jurors'] essential character . . . was that of representatives . . . and it is in this effort to get the representative voice of the community that we find the key to the real origin of the [petit] jury.").

As one historian has explained, the legitimacy of early juries derived principally from their representative nature:

> [T]he jury was a body of neighbors called in . . . to decide disputed questions of fact. They were in a sense witnesses. But they were more than witnesses. They were a method of proof that the parties were obliged or had agreed to accept. It was easier so to regard them, because *they represented the sense of the community . . . from which they were drawn . . . .*

1 Sir William Holdsworth, *A History of English Law* 317 (7th ed. 1956) (emphasis added). This view of the jury was by no means anomalous. As another historian remarked: "[i]n its origin the jury is of a representative character; *the basis of its composition in the early days . . . was clearly the intention to make it representative of the community.*" Theodore F.T. Plucknett, *A Concise History of the Common Law*, (Book 1) 127 (5th ed. 1956) (emphasis added).

Trial by jury emerged as a mature institution in England in the thirteenth century, when more traditional forms of trial became untenable.[6] *See* Van Dyke, *supra*, at 3-4. When trial by ordeal was officially prohibited in England, juries were called upon to decide the guilt or innocence of the accused. Wells, *supra*, at 349; Moore, *supra*, at 52. Significantly, the English system's commitment to impartiality and representativeness grew even stronger at this point. *See* Wells, *supra*, at 354. It was recognized that, for a verdict of actual guilt to be accepted by the parties and the community, the jury would have to be expanded to include more than individuals from the adjacent townships and the surrounding district. *Id.* ("while the [grand] jury was sufficiently representative to present an indictment, it might not be representative enough to give fairly and adequately the voice of the country in regard to the real guilt or innocence of the accused . . . ."). Therefore, to enhance their

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[6] Criminal jury trials existed before this time, but were rare because the parties had to agree to a jury trial, and to bear the associated costs. *See* Moore, *supra*, at 41. Both trial by compurgation (in which the accused was required to assemble a group of persons to swear that his version of events was trustworthy) and trial by ordeal (in which the accused underwent some form of physical torment in the belief that God would intervene to protect the innocent) had fallen into disuse by this time. Compurgation was found to be susceptible to abuse and venality, while trial by ordeal became invalid when Pope Innocent III forbade the clergy from administering the oaths on which the trials depended. 1 Plucknett, *supra*, at 115-16.

impartiality, juries were expanded to include individuals from the entire county.[7] *Id.* at 356.

Eventually, jurors came to be drawn from "all [geographic] parts of the County, with several members being selected from each hundred [neighborhood]." *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* 122 (J.S. Cockburn and T.A. Green eds., 1988)(discussing grand juries); *see also* Wells, *supra*, at 357 (noting the same practice was utilized for petit juries). The jury included equal numbers of men from different neighborhoods, with each group providing its own version of events. Van Dyke, *supra*, at 12; Wells, *supra*, at 357. This early example of the cross-section approach to juror selection rests on an implicit understanding that those living in different areas could decide things differently, and that fairness and impartiality can best be assured by collecting and balancing this range of perspectives. Wells, *supra*, at 358 ("By [selecting petit jurors from each neighborhood], a larger representation of the whole county could be secured, and thus a fairer estimate placed upon the merits of the case, and a truer verdict given . . . .").

The English legal system's early commitment to a truly representative jury found its fullest expression

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[7] Initially, this goal was achieved simply by adding additional members to the jury. These "combination juries" numbered from twenty-four to eighty-four individuals, and the number eventually became unwieldy. This approach was initially used only in special cases, but the practice became more widespread. *See* Wells, *supra*, at 356.

in the Magna Carta, which, as this Court has noted, "declared that no freeman should be deprived of life, etc., but by the judgment of his peers . . . ." *Thompson v. Utah*, 170 U.S. 343, 349 (1898). The phrase "judgment of his peers . . ." refers to a "trial by twelve jurors," *id.*, composed of individuals from the same class, legal status, or caste as the accused. *See* W.S. McKechnie, *Magna Carta: A Commentary* 378 (2d ed. 1914) (the "peers of a Crown tenant were his fellow Crown tenants"); 4 William Blackstone, *Commentaries* 344 (1769).[8] This provision ensured that "every Englishman" would be entitled to serve as jurors, and that the community from which jurors could be selected would not be limited to those beholden to the King. Blackstone, *supra*, at 344; *Twelve Good Men and True*, *supra*, at 35.[9]

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[8] Although there is some scholarly debate as to which article of the Magna Carta conferred the right to a criminal jury trial, it seems clear that the Magna Carta established this right. *See* Moore, *supra*, at 50-51.

[9] That eligibility for jury service in England was historically contingent upon the ownership of land does not undermine the view that English law has always been committed to ensuring impartiality through representative juries. As one commentator noted, the property requirement was viewed as "the necessary prerequisite of impartiality and independence," and as the "best guarantee of socially acceptable verdicts." *Twelve Good Men and True*, *supra*, at 123. The property requirement, then, was little different from the juror qualifications of today, which merely ensure that jurors are adult citizens capable of understanding the evidence and law. Indeed, the property requirement may be likened to the modern practice of excusing jurors whose limited financial means make jury service unduly burdensome. Moreover, in practice, medieval juries in *(cont'd)*

Thus, the view that a jury can be impartial only if it is representative of the entire community—a key element of the Sixth Amendment, implemented by the fair cross-section requirement of *Taylor* and *Duren*—has been central to the understanding of the role and value of juries for many centuries.

III. The Sixth Amendment's Fair Cross-Section Requirement Protects Crucial Societal and Governmental Interests.

As this Court has consistently recognized, the fair cross-section requirement supports the impartiality, democratic character, and legitimacy of the criminal justice system.

A. The Fair Cross-Section Requirement Supports the Impartiality of the Criminal Justice System.

The fair cross-section requirement buttresses the impartiality of our criminal justice system. This interest undergirds the constitutional right of the accused to a trial by jury. *See* U.S. Const. amend. VI.

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England were regularly comprised of those who failed to meet the property requirement — such as "day laborers, poor husbandmen and small craftsmen" — owing to the failure of many qualified landowners to appear for service. *Id.* at 125. English juries were therefore comprised of a broader cross-section of society than is sometimes presumed.

Securing impartiality presents challenges. For example, Justice Thomas has noted the persistent difficulty of reaching fair verdicts when defendants encounter racially homogeneous juries that do not fully reflect the community's demographics:

> [T]he racial composition of a jury may affect the outcome of a criminal case. We explained [in *Strauder*]: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." . . . [S]ecuring representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.
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> I do not think that this basic premise of *Strauder* has become obsolete.

Georgia v. McCollum, 505 U.S. 42, 60-61 (1992) (Thomas, J., concurring in judgment) (*quoting Strauder*, 100 U.S. at 309).[10]

Research confirms that the potential partiality of homogeneous juries has direct and measurable effects on verdicts. *See, e.g.*, Douglas L. Colbert,

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[10] In *McCollum*, the Court invalidated a criminal defendant's discriminatory peremptory strikes under the Equal Protection Clause. 505 U.S. at 59.

Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 110-115 (1991) ("[A]ll-white mock juries consistently returned more guilty verdicts against black defendants than they did when white defendants were charged with identical crimes"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611 (1985) (discussing original findings that all-white juries are biased against racial minorities); *cf.* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 608 (2006) ("[H]omogeneous groups spent less time on their decisions, made more errors, and considered fewer perspectives.").

Moreover, "a substantial body of empirical evidence has developed which shows that all-white juries are not impartial when deciding cases involving interracial crimes." Colbert, *supra*, at 110; *see also Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1559 (1988).

Conversely, studies have demonstrated that racially-heterogeneous juries tend to render verdicts influenced less by racial bias. *See* Colbert, *supra*, at 112 (citing J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 Law & Psychol. Rev. 103 (1979); Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 Hispanic J. Behav. Sci. 275 (1983)).

The fair cross-section requirement supports the critical governmental interest in impartial jury verdicts by counteracting these potential biases. With regard to cross-sectional jury venires, the Court has declared, "'The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality . . . .'" *Taylor*, 419 U.S. at 530. "In particular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case." *Ballew v. Georgia*, 435 U.S. 223, 234 (1978).

Supporting this objective, one commentator emphasized, "[G]iven differences in group behavior, a cross section will help cancel group biases." John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 Creighton L. Rev. 1137, 1138 (1978). As a result, "[the jury] as a whole . . . will be impartial, even though no juror is." Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 101 (1994) (citing *People v. Wheeler*, 583 P.2d 748, 755 (Cal. 1978) (discussing "overall impartiality"); *Commonwealth v. Soares*, 387 N.E.2d 499, 512, *cert. denied*, 444 U.S. 881 (Mass. 1979) (discussing "diffuse impartiality")).

Although it is doubtful that the long-held biases each juror brings to deliberations will merely evaporate upon entering the jury room with members of different groups, "the presence of persons from groups that are the object of prejudice [tends to] inhibit[] the expression of prejudice by other jurors." Ashby, *supra*, at 1139.

As one commentator suggests,

> The noble purpose of [a representative] jury [is] to silence expressions of group prejudice and to ratchet up the deliberations to a higher level of generality. Jurors wishing to be persuasive . . . now have to abandon arguments that depend[] on the particular prejudices or perspectives of their own kind. Their arguments . . . have to resonate across group lines.

Abramson, *supra*, at 101.

Impartiality, as required by the Sixth Amendment in criminal juries, requires tools that reduce the potential taint of group biases. In light of the tendency of representative juries to overcome bias, Justice Marshall's admonition regarding the importance of heterogeneous juries remains persuasive:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. . . . [I]ts exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503-504 (1972) (plurality opinion) (Marshall, J., joined by Douglas and Stewart, JJ.).[11]

The fair cross-section requirement does not exist merely as an end in itself, but rather as a means to foster more robust deliberation that minimizes jurors' reliance on preconceived notions. Thus, to the extent the fair cross-section requirement helps increase the potential for heterogeneity in the jury, it helps minimize expressions of bias that might lead members of the jury to rely impermissibly on prejudice rather than the evidence to reach a verdict. The requirement thereby fortifies societal and governmental interests in the constitutional principle of impartiality.

B. The Fair Cross-Section Requirement Reinforces Crucial Democratic Goals.

The fair cross-section requirement also significantly furthers the participatory aims of representative democracy. In *Taylor*, the Court described "community participation in the administration of the criminal law" as "consistent

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[11] In *Peters*, the Court invalidated the indictment and conviction of a Caucasian defendant because African Americans had been excluded from the grand jury. 407 U.S. 493. Three justices found that this systematic exclusion violated the Constitution. *Id.* at 504-05 (Marshall, Douglas, and Stewart, JJ.). Three others found this systematic exclusion violated federal statutory law. *Id.* at 506-07 (White, Brennan, and Powell, JJ., concurring in judgment).

with our democratic heritage." 419 U.S. at 530. This democratic participation is both a goal and a result of representative jury pools.

Notably, the Court has likened jury service to the fundamental right to vote: "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. Similarly, the Court recently highlighted the important democratic function of juries: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

This view is long-standing. Thomas Jefferson described trial by jury "as the only anchor yet imagined by man by which government can be held to the principles of its constitution." Robert C. Walters, et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 322 (2005). Tocqueville wrote that the American jury as an institution "always preserves its republican character" and that it appears to be "as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power." Alexis de Tocqueville, *Democracy in America*, 282-83 (Knopf 1951).

Modern scholars also recognize this aspect of jury service: "[J]ury service is the most direct contact that a citizen has with his government and, next to voting, about the only chance he has to participate in it as a basic decision-maker." Ashby, *supra*, at 1140

(citing Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 63 (1967)). Another scholar suggests, "[T]he link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure, spanning three centuries and eight amendments: the Fifth, Sixth, Seventh, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth." Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 206 (1994).

Discrete groups in our society often have been excluded from jury pools. *See, e.g., Taylor*, 419 U.S. 522 (1975) (women); *Thiel*, 328 U.S. at 219 (daily wage earners); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican Americans); *Smith*, 311 U.S. 128 (African Americans); *Norris v. Alabama*, 294 U.S. 587 (1935) (same).[12] In response, the Court has emphasized that the fair cross-section requirement protects the ability of citizens to participate in this vital, long-standing expression of democracy: "[T]he broad representative character of the jury should be maintained . . . because sharing in the administration of justice is a phase of civic responsibility." *Taylor*, 419 U.S. at 530-31.

Earlier, the Court similarly explained, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. . . .

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[12] Moreover, various commentators have discussed this persistent problem. *See infra* Part III.D, pp. 32-34.

[E]xclusion from jury service of otherwise qualified groups . . . is at war with our basic concepts of a democratic society and a representative government." *Smith*, 311 U.S. at 130.

Representative venires promote democratic principles by ensuring broad participation in the civic responsibility of administering public justice. Moreover, protecting the inclusion of identifiable groups in the jury venire—and thus potentially in the petit jury—helps ensure that verdicts reflect the values of the community. *See, e.g.*, Massaro, *supra*, at 546-47 ("This community concern is satisfied by a jury that includes *several* different community groups and that is selected through a procedure that over time is likely to include every group.") (emphasis in original); *cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) ("Trial by a jury . . . was important to the founders because juries . . . keep the administration of law in accord with the wishes and feelings of the community.") (citing Oliver W. Holmes, *Collected Legal Papers* 237 (1920)).

The Sixth Amendment's democratic mandate that the "impartial jury" be drawn from "the State and district where in the crime shall have been committed" likewise indicates that the jury should represent the views of the community overall. *See Taylor*, 419 U.S. at 525, 530-31; Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 Geo. L.J. 945, 958-59 (1998). The fair cross-section requirement helps to ensure that jury verdicts reflect the totality of these views by ensuring the opportunity for broad community participation.

The fair cross-section requirement also reinforces another democratic value: protection against the arbitrary exercise of governmental power. The Court has long recognized the role of the jury in furthering this societal interest: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . [It is] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 155-156; *see also Ex parte Milligan*, 71 U.S. 2, 126 (1866) ("[T]he lessons of history informed [the Founders] that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong.").

As the Court explained in *Taylor*, the fair cross-section requirement is essential to the jury's role in discharging this democratic function:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

419 U.S. at 530.

The fair cross-section requirement thus plays a critical role in protecting and enforcing the central democratic values that underlie the jury's role in the American system.

C. *The Fair Cross-Section Requirement Bolsters Public Confidence in the Jury System.*

The fair cross-section requirement also powerfully supports the perceived legitimacy of juries. As the Court has explained, "The purpose of the jury system is to impress upon the criminal defendant *and the community as a whole* that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413 (emphasis added).

Public confidence in the jury system depends not only upon broad democratic participation in or the actual impartiality of the system, but also the public's perception that jury verdicts are fair. *See, e.g.*, Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1038 (2003) ("Regardless of any direct effects on verdict, unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes."). In this regard, the public must view criminal verdicts as legitimate to prevent diminished trust in the system as a whole and maintain social order. *See id.* at 1039.

Inclusive venires (*i.e.*, those that represent all groups of the community) serve this interest. Both this Court and scholars have recognized the

relationship between inclusive juries, the perception of fairness, and public confidence in criminal justice. For example, Justice Thomas has explained:

> The public, in general, continues to believe that the makeup of juries can matter in certain instances. . . . Major newspapers regularly note the number of whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

McCollum, 505 U.S. at 60-61 (Thomas, J., concurring in judgment).

Studies confirm that groups under-represented on juries distrust the verdicts rendered by homogeneous juries. For example, researchers report:

> [T]he relationship between the verdict and the racial composition of the jury suggests that when the process is inclusionary (*i.e.*, the jury is racially heterogeneous), the outcome does not influence the perceived fairness of the trial. However, when the process fails to produce a heterogeneous jury (*i.e.*, the all-White jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair.

Ellis & Diamond, *supra*, at 1049. *See also* Ashby, *supra*, at 1139 ("When large classes of people are denied a role in the legal process, even if that denial is wholly unintentional or inadvertent, there is bound to be a sense of alienation from the social order."); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 Va. J. Soc. Pol'y & L. 646, 663-64 (1997).

The fair cross-section requirement helps to remedy this problem and buttresses public confidence in jury verdicts and the criminal justice system more broadly. *See Taylor*, 419 U.S. at 530 ("Community participation in the administration of the criminal law . . . is . . . critical to public confidence in the fairness of the criminal justice system."); *see also Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986); *Holland*, 493 U.S. at 489 (Kennedy, J., concurring).

The fair cross-section requirement also increases the chance that the petit jury will reflect the demographics of the community. This is an important component of perceived fairness "[b]ecause the jury's fairness is determined not only by its verdict but also by its visual appearance." Massaro, *supra*, at 517. Research shows that the public generally believes the verdicts of diverse juries are fairer. *See* Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 Am. Crim. L. Rev. 1177, 1182 (1994) ("[I]ncreasing the racial and ethnic diversity of juries

can make particular jury decisions seem fairer to litigants and observers, which in turn can bolster support for the jury as an institution."); Fukurai & Davies, *supra*, at 663-64.

Thus, the fair cross-section requirement not only furthers impartiality and democratic values, but it also contributes substantially to the public's faith that the jury system is legitimate, and its verdicts worthy of confidence and respect.

D. *The Fair Cross-Section Requirement Remains Necessary.*

Meritorious challenges under the Sixth Amendment's cross-section requirement continue to be an important mechanism for ensuring the fairness and reliability of juries. *See, e.g., United States v. Jackman*, 46 F.3d 1240, 1244 (2d Cir. 1995) (violation established where venire was selected from a list that under-represented minorities because it inadvertently omitted two cities with the highest minority population); *United States v. Osorio*, 801 F. Supp. 966, 975 (D. Conn. 1992) (prima facia cross-section violation found where jury lists inadvertently excluded all residents of New Britain and Hartford); *People v. Hubbard*, 552 N.W.2d 493, 504 (Mich. Ct. App. 1996); *In Re Rhymes*, 170 Cal. App. 3d 1100 (1985).

Research confirms that under-representation of distinctive groups in the community remains a significant problem in many jurisdictions. For example, in 2007, Citizen Action of New York tallied the race status of over 14,000 Manhattan residents reporting for jury duty at jury assembly rooms for

civil and criminal cases in the Supreme Court, New York County (Manhattan) for a 12-week period from November 2006 to February 2007. *See* Bob Cohen & Janet Rosales, *Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform* (June 2007).

This study concluded that Hispanics were under-represented by 77% and African Americans were under-represented by 42%, while Caucasians were over-represented by 43%, as measured by their proportionate share of Manhattan's population. *Id.* at i.

Similarly, a jury assessment report for the Third Judicial Circuit Court of Wayne County, Michigan, found that in 2004 through 2005, African-Americans comprised only 25.7% of the jury pool, compared to 39.6% of the Wayne County adult population, creating an average disparity of 13.9%. Paula L. Hannaford-Agor & G. Thomas Munsterman, *Third Judicial Circuit of Michigan Jury System Assessment, Final Report,* i (National Center for State Courts, Aug. 2, 2006).

Another study concluded that ethnic minorities are under-represented in jury pools in Dallas and Harris Counties, Texas. Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 Judges J. 17, 17 (2004). The study found that "[d]espite the fact that Hispanics comprise about one-third of Dallas County's adult population, less than 10 percent of those who show up for duty are Latino. . . . [and] [w]hile more than 30 percent of Harris County is Latino, less than 13 percent of those who

participated in the jury system are Latino." *Id.* at 19.

Studies show that under-representation of certain groups in the jury-selection process remains a problem in various other states, as well. *See, e.g.*, Nebraska Minority Justice Committee, *Representative Juries: Examining the Initial and Eligible Pool of Jurors* 26 (Dec. 2008) ("data indicate that there are significant racial disparities in the initial and eligible pool of jurors."); South Dakota Equal Justice Commission, *Final Report and Recommendations* 8 (2006) (South Dakota juries "rarely represent the racial composition of a community."); *Report of the Alaska Supreme Court Advisory Committee on Fairness and Access* 83 (Oct. 31, 1997) (Native Alaskans under-represented in Kodiak and Nome, African-Americans under-represented in Anchorage and Fairbanks, and Asian-Americans under-represented in Anchorage).

Accordingly, any attempt to characterize *Taylor*, or the fair cross-section requirement, as a relic that has outlived its usefulness is belied by the facts. In reality, *Taylor*, with its explication of the core Sixth Amendment right to "an impartial jury," remains vital precedent that is necessary to safeguard a constitutional right that fosters the public's confidence and participation in government.

IV. Principles of *Stare Decisis* Strongly Support The Fair Cross-Section Requirement.

In *Taylor*, this Court articulated a clear principle of constitutional law that enforces a longstanding, fundamental right. *See* Part I, *supra*. The rule is eminently sound in principle and, with the benefit of *Duren*'s additional guidance, has proven entirely workable in practice.

Abandoning *Taylor* would unnecessarily "cast[] aside workability and relevance and substitute[] uncertainty." *Williams*, 399 U.S. at 129 (Harlan, J., concurring in part and dissenting in part). This Court should not endorse a result that would, inevitably, make enforcement of the obligation to provide an impartial jury more cumbersome, erratic, and unpredictable. *Taylor* was correct as an initial matter; its role as settled precedent further counsels strongly against discarding it.

This Court has repeatedly held that the doctrine of *stare decisis* "is of fundamental importance to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Fidelity to precedent "ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

Stare decisis allows society "to presume that bedrock principles are founded in law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Id.* at 265-66. Even in cases involving

constitutional rights, rejection of precedent requires a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

Amicus Criminal Justice Legal Foundation makes the anomalous suggestion that the fair cross-section requirement should be abandoned because objections to the composition of the venire can be addressed through the Equal Protection Clause. *See* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 25-32.

This suggestion is unpersuasive. Since the Sixth Amendment explicitly addresses the requirement of "an impartial jury," it reverses both logic and law to suggest that the Sixth Amendment should be abridged and that a claim addressing the impartiality of the jury should be considered only under the general contours of the Equal Protection Clause.

This suggestion is especially inapt because the Sixth Amendment's guarantee of an impartial jury in the Bill of Rights reflects its cardinal role in the American system. Far from being irrelevant or redundant, the Sixth Amendment's "impartial jury" requirement is central to the fair-cross-section issue; it makes little sense to contend that all such jury challenges should be raised only under the complex equal protection jurisprudence developed in vastly different contexts.

There are also critical distinctions between the Sixth Amendment's fair cross-section right and Equal Protection that weigh overwhelmingly in favor of retaining the former as the means for ensuring impartial juries. For example, while Equal

Protection forbids discrimination against identifiable groups, the Sixth Amendment's fair cross-section right directly promotes the ideal of ensuring that juries represent all distinct groups within a community, thereby more directly promoting the constitutional values at stake.

Also, the fair cross-section right directly vindicates the defendant's interest in a fair trial, binding this interest directly to the cross-sectional ideal, while Equal Protection promotes citizens' equal access to participate in the criminal justice system. The fair cross-section right also addresses those instances in which purposefully different treatment of classes is absent, but computer glitches or other systemic problems result in an unbalanced venire.

Consequently, to withdraw the right of defendants to have potential jurors selected from a fair cross-section of the community would be inconsistent with any appropriate notion of constitutional decision-making. Only if a precedent is "unsound in principle," "unworkable in practice," or has led to inconsistent, unforeseen, or anomalous results would such a radical step be warranted. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). None of these justifications is present here. To the contrary, the fair cross-section requirement recognized in *Taylor* is sound in principle and workable in practice, and has led to principled results that further the quintessential American value of "an impartial jury." As a result, it should be fortified, not discarded.

CONCLUSION

For the foregoing reasons, and for the reasons stated by the Respondent, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

JOSHUA DRATEL
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L ST., N.W.
12TH FLOOR
WASHINGTON, DC 20036
(202) 872-8600

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004
(212) 549-2500

CLIFFORD M. SLOAN
Counsel of Record
NEIL LOMBARDO
RAY D. MCKENZIE
PATRICK HAGGERTY
1440 NEW YORK AVE., N. W.
WASHINGTON, D. C. 20005
(202) 371-7000

THOMAS M. MEYER
NATIONAL JURY PROJECT
2831 TELEGRAPH AVE.
OAKLAND, CA 94609
(510) 524-6568

Attorneys for Amici Curiae

December 28, 2009

AMICUS CURIAE BRIEF

No. 08-1402

In The Supreme Court of the United States

MARY BERGHUIS, WARDEN, PETITIONER,

v.

DIAPOLIS SMITH.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR SOCIAL SCIENTISTS, STATISTICIANS, AND LAW PROFESSORS, JEFFREY FAGAN, ET AL., AS *AMICI CURIAE* SUPPORTING RESPONDENT

ERIK LEVIN
Counsel of Record
NEW YORK UNIVERSITY SCHOOL OF LAW
245 Sullivan Street
New York, NY 10012
(212) 992-8149

DAVID KAIRYS
TEMPLE UNIVERSITY SCHOOL OF LAW
1719 North Broad Street
Philadelphia, PA 19122
(215) 204-8959

JACK C. AUSPITZ
MARK DAVID MCPHERSON
LEAH C. FLETCHER
SHIRI BILIK WOLF
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104-0050
(212) 468-8263

Counsel for Amici Curiae

DECEMBER 23, 2009

[Additional Amici Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

IDENTIFICATION OF *AMICI CURIAE*

JEFFREY FAGAN
Professor of Law and Epidemiology
LAW SCHOOL
COLUMBIA UNIVERSITY

JEFFREY B. ABRAMSON
Professor of Law and Government
SCHOOL OF LAW
UNIVERSITY OF TEXAS AT AUSTIN

DAVID C. BALDUS
Joseph B. Tye Professor of Law
COLLEGE OF LAW
UNIVERSITY OF IOWA

ANDREW A. BEVERIDGE
Professor of Sociology
QUEENS COLLEGE AND THE GRADUATE CENTER
CITY UNIVERSITY OF NEW YORK

JOHN H. BLUME
Professor of Law
LAW SCHOOL
CORNELL UNIVERSITY

ALFRED BLUMSTEIN
J. Erik Jonsson University Professor of Urban Systems and Operations Research
Former Dean of the Heinz School
HEINZ COLLEGE
CARNEGIE MELLON UNIVERSITY

ROBERT W. BRAME
Professor
DEPARTMENT OF CRIMINAL JUSTICE
UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE

RICHARD BROOKS
Professor
LAW SCHOOL
YALE UNIVERSITY

DEBORAH W. DENNO
Arthur A. McGivney Professor of Law
SCHOOL OF LAW
FORDHAM UNIVERSITY

SHARI SEIDMAN DIAMOND
Howard J. Trienens Professor of Law
Professor of Psychology
SCHOOL OF LAW
NORTHWESTERN UNIVERSITY

PHOEBE C. ELLSWORTH
Frank Murphy Distinguished University Professor of Psychology and Law
DEPARTMENT OF PSYCHOLOGY
UNIVERSITY OF MICHIGAN

DAVID EPSTEIN
Professor
DEPARTMENT OF POLITICAL SCIENCE
COLUMBIA UNIVERSITY

PHILLIP ATIBA GOFF
Assistant Professor
DEPARTMENT OF PSYCHOLOGY
UNIVERSITY OF CALIFORNIA
AT LOS ANGELES

SAMUEL R. GROSS
Thomas and Mabel Long
Professor of Law
LAW SCHOOL
UNIVERSITY OF MICHIGAN

BERNARD E. HARCOURT
Julius Kreeger Professor
of Law & Criminology
Professor of Political Science
LAW SCHOOL
UNIVERSITY OF CHICAGO

JOSEPH B. KADANE
Leonard J. Savage University
Professor of Statistics and
Social Sciences, Emeritus
DEPARTMENT OF STATISTICS
CARNEGIE MELLON UNIVERSITY

JOHN P. LEHOCZKY
Thomas Lord
Professor of Statistics
DEPARTMENT OF STATISTICS
CARNEGIE MELLON UNIVERSITY

BRUCE LEVIN
Professor and Chair
DEPARTMENT OF BIOSTATISTICS
MAILMAN SCHOOL OF
PUBLIC HEALTH
COLUMBIA UNIVERSITY

MONA LYNCH
Associate Professor of
Criminology, Law &
Society
SCHOOL OF SOCIAL ECOLOGY
UNIVERSITY OF CALIFORNIA
AT IRVINE

JOHN T. MONAHAN
John S. Shannon
Distinguished Professor
of Law
Horace W. Goldsmith
Research Professor of Law
Professor of Psychology
Professor of Psychiatric
Medicine and
Neurobehavioral
Sciences
COLLEGE OF ARTS
AND SCIENCE
SCHOOL OF MEDICINE
LAW SCHOOL
UNIVERSITY OF VIRGINIA

RAYMOND PATERNOSTER
Professor
DEPARTMENT OF CRIMINOLOGY
AND CRIMINAL JUSTICE
UNIVERSITY OF MARYLAND

ALEX PIQUERO
Professor
COLLEGE OF CRIMINOLOGY
AND CRIMINAL JUSTICE
FLORIDA STATE UNIVERSITY

MICHAEL L. RADELET
Professor
DEPARTMENT OF SOCIOLOGY
UNIVERSITY OF COLORADO
AT BOULDER

RICHARD ROSENFELD
Curators Professor
DEPARTMENT OF CRIMINOLOGY
AND CRIMINAL JUSTICE
UNIVERSITY OF MISSOURI
AT ST. LOUIS

SAMUEL R. SOMMERS
Assistant Professor
DEPARTMENT OF PSYCHOLOGY
TUFTS UNIVERSITY

CHRISTOPHER WINSHIP
Diker-Tishman
Professor of Sociology
DEPARTMENT OF SOCIOLOGY
HARVARD UNIVERSITY

FRANKLIN E. ZIMRING
William G. Simon
Professor of Law
Wolfen Distinguished Scholar
BOALT HALL SCHOOL OF LAW
UNIVERSITY OF CALIFORNIA
AT BERKELEY

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Stephen T. Ziliak & Deirdre N. McCloskey, *The Cult of Statistical Significance: How the Standard Error Costs Us Jobs, Justice, and Lives* (2008) 29

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading social scientists, statisticians, and law professors actively engaged in social scientific research focused on the criminal justice system. Included among *amici* are authors of authoritative books and articles on statistics and the application of statistics in social science. *Amici* have written and conducted studies on a broad range of topics concerning the criminal justice and jury systems. Many *amici* are members and leaders of associations in their fields, including the National Academy of Sciences, the National Science Foundation, and the American Society of Criminology.

Amici curiae submit this brief to evaluate the various proposed methods for measuring underrepresentation in juror pools and to provide information and analysis about the underlying statistical issues presented in this case. *Amici* suggest adoption of the comparative disparity method because it provides a quantitative measure of the degree or extent of underrepresentation that is both scientifically valid

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

and consistent with the constitutional principle of cross-sectionality.

In this case, the Michigan Supreme Court endorsed the use of multiple methods—including absolute disparity, comparative disparity, and statistical significance—to measure the underrepresentation of African Americans in the Kent County Circuit Court jury pool. While *amici* agree with the Michigan Supreme Court and the Sixth Circuit that comparative disparity is a proper method for measuring the degree of underrepresentation in the jury pool, *amici* believe that absolute disparity is an inappropriate and misleading measure of underrepresentation.

Of particular concern to *amici* is the standard suggested by Petitioner, and accepted by some courts, as the proper and exclusive method for evaluating Sixth Amendment fair-cross-section claims: a blanket rule that no underrepresentation can be challenged unless it presents an absolute disparity of greater than 10 percent between the composition of the population and the jury pool. *Amici curiae* oppose this proposed new rule on statistical and constitutional grounds, and present here demographic data showing that adoption of the greater than 10 percent absolute disparity standard would deny the fair-cross-section guarantee to the vast majority of Americans and in the vast majority of American courts, and would seriously undermine the integrity and legitimacy of our judicial system.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has never designated a particular statistical method to evaluate underrepresentation in the jury pool. The Court has relied on three different statistical methods in equal protection challenges to the composition of a jury pool and in cases seeking to vindicate the Sixth Amendment's guarantee of a jury drawn from a fair cross section of the community. Each of these methods has its virtues and limitations.

The absolute disparity method subtracts a group's percentage of the jury pool from its percentage of the population. While simple to use, it is not a good measure of the degree of underrepresentation because it does not take account of the group's size. For example, if in one court a group is 70 percent of the population and 60 percent of the jury pool, and in another court a group is 12 percent of the population and 2 percent of the jury pool, both courts would see the same absolute disparity—10 percent. But these examples of underrepresentation are statistically and constitutionally very different. In the latter court, the group, though a sizable minority, is almost completely excluded, while the former group, and the representativeness of the jury pool, is far less affected. Absolute disparity produces identical results in vastly different circumstances. It both overstates insignificant disparities of large groups and understates significant disparities of small groups—even those resulting in complete exclusion.

Reliance on absolute disparity alone is therefore troubling enough. But Petitioner's embrace of a threshold of 10 percent absolute disparity as a constitutional standard is particularly unwise given the country's demographic composition (set out in detail, *infra*). Underrepresentation of a group that is 10 percent or less of the population cannot exceed a 10 percent absolute disparity, even if the group were entirely excluded from a jury system. And in the overwhelming majority of U.S. counties, African Americans, Hispanics, Asian Americans, and other minority groups each make up 10 percent or less of the population, although they are often more than 5 percent individually, and together often account for as much as a quarter or more of the population. Consequently, far from being a reasonable bright-line rule to discern systematic underrepresentation from mere happenstance, adoption of a 10-percent standard would deprive the vast majority of this country of the right to jury pools in which African Americans, Hispanics, Asian Americans, and other smaller minority groups are fairly represented. It would, for all practical purposes, eliminate the Sixth Amendment fair-cross-section guarantee.

Some courts have used a statistical significance test as an alternative to absolute disparity, calculating the probability that the disparity between the population and the jury pool would occur by chance if the jury pool were randomly drawn from the population. If the probability is low—generally, meaning 5 percent or less—the court can conclude

that the jury pool was not randomly drawn from the population. The primary limitation of this method is that it fails to answer the constitutional question: when is underrepresentation in the jury pool so unfair and unreasonable as to be unconstitutional? Because statistical significance tests do not report the *degree* of underrepresentation, they do not answer that question. Most statistical significance tests also suffer from extreme sensitivity to the size of the jury pool. When sample sizes are large, even small disparities may be statistically significant, and lead to a rejection of the fairness of the jury pool. The statistical significance test, applied to common sizes of jury pools, results in too broad an invalidation of jury systems.

The third alternative—the one *amici* urge the Court to adopt—is the comparative disparity standard. Comparative disparity measures underrepresentation by the proportion of the group missing from the jury pool. If, for example, a group is 30 percent of the jury-eligible population but only 20 percent of the pool, that group is underrepresented by a 33.3 percent comparative disparity (the absolute disparity divided by the proportion of the group in the community). By measuring the degree by which a group is underrepresented on a jury pool, comparative disparity is the only method that can guide a court's determination of the point at which underrepresentation becomes unconstitutional. Comparative disparity avoids absolute disparity's central flaw—its inability to accurately reflect the degree of

underrepresentation of various sizes of distinct groups.

As some courts have recognized, for very small minority populations, comparative disparity can exaggerate the extent of underrepresentation. Unlike absolute disparity, however, that limitation of comparative disparity can be easily addressed, by requiring a higher threshold of underrepresentation when the group is small.

Amici therefore suggest a two-tiered approach, under which comparative disparities of greater than 15 percent satisfy the underrepresentation prong of *Duren v. Missouri*, 439 U.S. 357 (1979), unless the distinct group is less than 10 percent of the jury-eligible population, in which case a comparative disparity of greater than 25 percent should be required.

ARGUMENT

THE COMPARATIVE DISPARITY METHOD BEST VINDICATES THE PRINCIPLES EMBODIED IN THE SIXTH AMENDMENT'S FAIR-CROSS-SECTION GUARANTEE

A. The Sixth Amendment Guarantees That Representation Of Distinct Groups In The Jury Pool Be Fair And Reasonable In Relation To Their Presence In The Community

1. The Sixth Amendment guarantees "the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed." In *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), this Court construed that constitutional guarantee to include the right to a jury drawn from a fair cross section of the community. This right is critical to the democratic function of the jury: "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Id.* at 530. To achieve this ideal, *Taylor* concluded that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538; *see also Holland v. Illinois*, 493 U.S. 474, 480-81 (1990) (noting that the fair-cross-section requirement is a means of achieving impartiality).

Four years after *Taylor*, in *Duren v. Missouri*, 439 U.S. 357 (1979), the Court outlined the elements of a *prima facie* violation of the Sixth Amendment right to a fair cross section of the community: (a) the group alleged to be excluded is a distinct group (cognizable group prong); (b) the representation of the group in the jury pool is not fair and reasonable in relation to the number of such persons in the community (underrepresentation prong); and (c) the underrepresentation is due to systematic exclusion of the group in the jury-selection process (systematic prong).

Id. at 364. If a defendant demonstrates a *prima facie* violation, the government must justify its jury-selection practices by establishing "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-68.

Duren is the latest in a long line of decisions that consistently emphasize the unique constitutional significance of jury representativeness. It presents a common form of discrimination: a group is under-represented in a government institution. But in addition, jury unrepresentativeness undermines the rights of litigants to a fair trial and the integrity and legitimacy of our courts.[2] *See Taylor*, 419 U.S. at 530, 532 n.12.

2. The underrepresentation prong has garnered the most attention from courts and commentators.

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[2] A *prima facie* equal protection claim can be established in the jury context by demonstrating substantial underrepresentation in combination with a clear opportunity to discriminate. *See, e.g., Alexander v. Louisiana*, 405 U.S. 625, 630 (1972) (finding *prima facie* equal protection violation established through proof of substantial underrepresentation and "clear and easy opportunity for racial discrimination"); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) ("[T]o show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."); *Turner v. Fouche*, 396 U.S. 346, 360 (1970).

Lower federal and state courts have adopted a range of statistical methods to distinguish tolerable from unconstitutional disparities, including, most prominently, the comparative and absolute disparity standards.

This Court has never required a single or exclusive method for evaluating a fair-cross-section claim. Each time the Court has considered the fair-cross-section guarantee, the magnitude of the disparity was so extreme that it was manifest under any of the accepted metrics. *See Taylor*, 419 U.S. at 524 (women were no more than 10 percent of the jury wheel despite being 53 percent of the adult community); *Duren*, 439 U.S. at 362-63 (women were 14.5 percent of the post-summons weekly venires during a 8-month period and 15.5 percent in the month of the trial despite being 54 percent of the adult community).

This Court has used multiple methodologies—including absolute and comparative disparity, as well as statistical significance—to evaluate underrepresentation claims. In *Castaneda v. Partida*, 430 U.S. at 495-96 & n.17, the Court relied upon statistical significance to find that the disparity between the proportion of Mexican Americans in the population and those summoned for the grand jury was the result of intentional discrimination. In *Alexander*, 405 U.S. at 629, the Court considered both comparative disparity and statistical significance to

find that a *prima facie* equal protection violation had been established.[3]

In short, this Court has never insisted upon the absolute disparity method for evaluating underrepresentation. And contrary to Petitioner's proposed blanket rule—which forecloses any challenge unless a group is underrepresented by an absolute disparity of more than 10 percent—the only decision of this Court mentioning the possibility, *Swain v. Alabama*, 380 U.S. 202 (1965), has been noticeably absent from the Court's decisions on the substantiality of jury underrepresentation for the succeeding 45 years. *Swain* has not been followed or even cited by this Court on this issue in *Duren*, *Taylor*, or any of its equal protection or Sixth Amendment decisions, even where the proposed 10 percent absolute disparity rule would have been determinative.[4]

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[3] *Alexander* did not refer to the comparative disparity method by name, but the Court's approach makes clear that it used that method: "21% of the population was Negro [but the] pool of possible grand jurors . . . was 14% Negro, a reduction by one-third of possible black grand jurors. The commissioners then twice culled this group to create a list of 400 prospective jurors, 7% of whom were Negro—a further reduction by one-half." 405 U.S. at 629. The Court also considered statistical significance: "under one statistical technique of calculating probability, the chances that 27 Negroes would have been selected at random for the 400-member final jury list, when 1,015 out of the 7,374 questionnaires returned were from Negroes, are one in 20,000." *Id.* at 630 n.9.

[4] In *Vasquez v. Hillery*, 474 U.S. 254, 268 n.2 (1986), neither *Swain* nor the 10 percent rule is mentioned by the majority or

(Continued on following page)

The Court has made clear, however, the goal to which any of these statistical methods must be applied. The appropriate method must distinguish tolerable from unconstitutional disparities between a distinct group's population in the community and its representation on a jury pool. As *Duren* put it, the question is whether a group's representation on a jury pool is "fair and reasonable" in relation to the group's population in the community. Any statistical method employed in a case construing the Sixth Amendment's fair-cross-section guarantee must answer that fundamental question.

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dissent, although the Court invalidated an underrepresentation that presented an absolute disparity less than 10 percent. This Court did not cite to *Swain*'s 10 percent rule in any of its subsequent underrepresentation cases. *See, e.g., Whitus v. Georgia*, 385 U.S. 545 (1967); *Turner, supra*; *Alexander, supra; Duren, supra; Taylor, supra; Castaneda, supra*.

While this Court partly overruled *Swain* in *Batson v. Kentucky*, 476 U.S. 79 (1986), and has otherwise disregarded it, the Fifth, Seventh, Eighth, and Eleventh Circuits have all applied *Swain*'s 10 percent rule to fair-cross-section cases. *See United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980); *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981); *United States v. Tuttle*, 729 F.2d 1325, 1327 (11th Cir. 1984).

B. The Absolute Disparity Standard Fails To Accurately Measure Substantial Underrepresentation, Much Less Properly Vindicate The Constitutional Interests At Stake

1. Absolute Disparity Fails to Measure the Degree of Underrepresentation in a Jury Pool

The absolute disparity measure—the arithmetic difference between a group's proportion of the population and its proportion of the jury pool—fails to address the fundamental question posed by the underrepresentation prong: whether the group's representation in a jury pool is fair and reasonable in relation to its presence in the community. By not accounting for the size of an underrepresented group, absolute disparity fails to distinguish relatively inconsequential underrepresentation from complete exclusion. To demonstrate the point, we include here a table showing potential underrepresentation claims by groups of various sizes.

Table 1. Comparison of Various Standards of Jury Representativeness[6]
(Shaded where values exceed suggested underrepresentation limits)

Group's Representation in Population and Jury Pool		Underrepresentation as Calculated by the Various Standards of Representativeness					
				Statistical Significance (expressed as probability) for Various Jury Pool Sizes:			
Population Proportion (%)	Jury Pool Proportion (%)	*Absolute Disparity* (%)	*Comparative Disparity* (%)	500	1,000	10,000	50,000
70	60	10.0	14.2	Less than 1 out of a million	Less than 1 out of a trillion	Less than 1 out of a trillion trillion	Less than 1 out of a trillion trillion
30	20	10.0	33.3	Less than 1 out of 100,000	Less than 1 out of a billion	Less than 1 out of a trillion trillion	Less than 1 out of a trillion trillion
30	27	3.0	10.0	13.7%	4.7%	Less than 1 out of a trillion	Less than 1 out of a trillion trillion
15	5	10.0	66.7	Less than 1 out of 100 billion	Less than 1 out of a trillion	Less than 1 out of a trillion trillion	Less than 1 out of a trillion trillion
12	2	10.0	83.3	Less than 1 out of a trillion	Less than 1 out of a trillion trillion	Less than 1 out of a trillion trillion	Less than 1 out of a trillion trillion
7.28	4.75	2.5	34.8	3.72%	Less than 4 out of a thousand	Less than 1 out of a billion trillion	Less than 1 out of a trillion trillion

[6] This table compares the results of underrepresentation calculations by the three common standards of representativeness for six different combinations of a group's proportion of the population and the jury pool. The results are presented with a shaded background if they exceed allowable underrepresentation limits as the various standards have been commonly used or proposed: an absolute disparity over 10%; a comparative disparity over 15% or, for minorities less than 10% of the population, over 25%; a statistical significance probability less than 5%. The probabilities were calculated using the normal approximation to the binomial distribution according to the central limit theorem. The statistical significance test can only be calculated with an additional variable, the size of, or number of people in, the qualified jury pool, so its results are presented for four different jury pool sizes that are common for various jury systems. The probabilities for the statistical significance results are expressed either as a percentage (e.g., 5%, which as a decimal is .05) or as "Less than 1 out of a trillion" (which in scientific notation is usually expressed as 1×10^{-12}); they can also be expressed in terms of "standard deviations," 1.64 of which (for a "one-sided" significance test; for a "two-sided" test, it would be 1.96, or about 2) usually corresponds to a probability of 5%. The table does not present any specific probabilities lower than "1 out of a trillion trillion," which is 1 out of 1,000,000,000,000,000,000,000,000, or in scientific terms, 1×10^{-24}; lower probabilities are included in "Less than 1 out of a trillion trillion."

Table 1 shows how absolute disparity remains constant even when measuring statistically and constitutionally dissimilar underrepresentation. The very large group represented in the first row of Table 1 composes 70 percent of the population, but is only 60 percent of the jury pool. Accordingly, this group is underrepresented by a 10 percent absolute disparity (70%-60% = 10%). The medium-sized group that is 30 percent of the population, but only 20 percent of the jury pool (second row), also has a 10 percent absolute disparity, as does the group that is 12 percent of the community, but only 2 percent of the jury pool (fifth row).

But absolute disparity conceals significant differences among these examples—differences that matter both statistically and constitutionally. The 70 percent-to-60 percent group is 14 percent less likely to be represented in the jury pool as a result of the underrepresentation, while the 30 percent-to-20 percent group is 33 percent less likely to be represented in the jury pool. The most severe underrepresentation occurs to the 12 percent-to-2 percent group, which is 83 percent less likely to be represented on the jury pool—almost total exclusion. Despite these widely varying circumstances, the absolute disparity remains constant in all three examples, yielding identical results in palpably different situations.

Absolute disparity thereby distorts the evaluation of underrepresentation. When distinct groups are small, absolute disparity legitimates complete

exclusion, because absolute disparity can never exceed a group's overall proportion of the population (i.e., a distinct group composing 8 percent of the population can never have an absolute disparity greater than 8 percent). Even for medium-sized minority groups, at 12 percent or 15 percent of the community, a 10 percent absolute disparity allows near total exclusion. At the same time, absolute disparity invalidates moderate underrepresentation of very large groups. If the underrepresentation of the 70 percent group goes over 10 percent, say to 10.1 percent, it would be invalidated under a greater-than-10 percent rule. This large group is less affected by such underrepresentation.

This critique of the absolute disparity method finds widespread support in legal commentary.[6] Commentators have documented the manner in

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[6] *See, e.g.*, Sara Sun Beale, *Integrating Statistical Evidence and Legal Theory to Challenge the Selection of Grand and Petit Jurors*, 46 Law & Contemp. Probs. 269, 273 (1983); John P. Bueker, *Note: Jury Source Lists: Does Supplementation Really Work?*, 82 Cornell L. Rev. 390 (1997); David Kairys, Joseph Kadane & John Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 793 (1977); Richard M. Re, *Note: Justifying The Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 Yale L.J. 1568, 1614 (2007); Peter W. Sperlich & Martin J. Japovice, *Methods for Analysis of Jury Panel Selections: Testing for Discrimination in a Series of Panels*, 6 Hastings Con. L.Q. 787, 794 (1979); Cynthia A. Williams, *Note: Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. Rev. 590, 611-12 (1990).

which absolute disparity "can produce seemingly low levels of disparity in situations where common sense and statistical analysis indicate significant under-representation." Richard Seltzer et al., *Fair Cross-Section Challenges in Maryland: An Analysis and Proposal*, 25 U. Balt. L. Rev. 127, 135 (1996) (recommending the use of comparative disparity). Moreover, "[i]f the distinctive group is a minority group with a small population in the geographic region, a 10% absolute disparity measure will allow the exclusion of most or all of the group without protest from the courts." Williams, *supra*, *Note: Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. Rev. at 612 (recommending the use of comparative disparity); *see also* Bueker, *supra*, *Note: Jury Source Lists: Does Supplementation Really Work?*, 82 Cornell L. Rev. 390.

These criticisms have not been lost on courts, including those that have been constrained by their Circuit's precedent to use the absolute disparity measure. The Second Circuit, for example, has noted absolute disparity's central flaw (while nonetheless adhering to it). *United States v. Biaggi*, 909 F.2d 662, 678 (2d Cir. 1990) (noting that absolute disparity risks "tolerat[ing] a selection system in which the seemingly innocuous absence of small numbers of a minority from an average array creates an unacceptable probability that the minority members of the jury ultimately selected will be markedly deficient in number and sometimes totally missing");

see also Alston v. Manson, 791 F.2d 255, 259 (2d Cir. 1986) ("[T]he absolute disparity approach . . . may be outmoded and should be discarded. In light of our fourteenth amendment analysis, however, we need not reach this question."); *United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) ("[I]n *Biaggi* we recognized that the absolute numbers approach is of questionable validity when applied to an under-represented group that is a small percentage of the total population.").

The Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have all echoed these concerns. *See, e.g.*, *Mosley v. Dretke*, 370 F.3d 467, 479 n.5 (5th Cir. 2004) ("We leave open the possibility that if the distinctive group at issue makes up less than 10% of the population, comparative disparity may be used.");[7] *United States v. Rogers*, 73 F.3d 774, 776-77 (8th Cir. 1996) ("Although utilizing the absolute disparity calculation may seem intuitive, its result understates the systematic representative deficiencies; the percentage disparity can never exceed the percentage of [the distinct group] in the community."); *Hirst v. Gertzen*, 676 F.2d 1252, 1258 n.14 (9th Cir. 1982) ("Where the cognizable group involved in the jury

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[7] *See also Foster v. Sparks*, 506 F.2d 805, 835 (5th Cir. 1975) (suggesting that "an intractable use of the absolute measure may, in certain circumstances also produce distorted results. . . . Hence, flexible use of the two measures is advisable, with the selection of either to be guided by both a desire to avoid distorted results and a need to adequately protect the interests of those challenging the selection system.").

challenge represents a small percentage of the population, [comparative disparity] is the more informative. Since the group in question makes up a relatively small percentage of the population, the 'absolute' disparity between the percentage of the group in the population and the percentage on the jury venire will always be small, even where the group has essentially been eliminated during the selection process."); *United States v. Rodriguez-Lara*, 421 F.3d 932, 944 n.10 (9th Cir. 2005) ("The comparative disparity method can distort the effect of disparities in representation when absolute numbers are low. . . . However, absolute disparity is also problematic. For example, our circuit has tolerated absolute disparities in distinctive group representation of up to 7.7%. . . . The necessary implication of this margin is that if a distinctive group makes up 7.7% or less of the community, then the fair-cross-section requirement offers no redress even if that group is *entirely shut out of the jury pool*. . . . While Ninth Circuit precedent requires us to evaluate representativeness using absolute disparity statistics alone, that approach is not without short-comings.") (internal citations omitted); *United States v. Shinault*, 147 F.3d 1266, 1273 (10th Cir. 1998) ("Indeed, small absolute disparity figures are less persuasive in a case such as this, where, because of the minorities' small population, even the complete exclusion of the groups would result in absolute disparities of less than 6%."); *United States v. Rodriguez*, 776 F.2d 1509, 1511 n.4 (11th Cir. 1985) (suggesting that a method other than absolute

disparity may be necessary when the minority group does not exceed 10 percent of the population).

Thus, there is broad recognition that absolute disparity is an inadequate indicator of whether a distinct group is substantially underrepresented in the jury pool. By failing to differentiate the effects of underrepresentation on small, medium, and large distinct groups, absolute disparity legitimates complete exclusion of small distinct groups, even as it invalidates minor underrepresentation in large distinct groups.

2. *Petitioner's Proposed Rule, Requiring More Than 10 Percent Absolute Disparity to Challenge Any Jury System, Would Effectively Eliminate the Fair-Cross-Section Guarantee*

Since no group can have an absolute disparity greater than its presence in the community, setting the requisite threshold for a constitutional violation of the fair-cross-section guarantee at greater than 10 percent would have a pernicious effect: any group that is 10 percent or less of the jury-eligible population could be completely excluded. The 10-percent standard would tolerate even greater multiple disparities in communities where multiple ethnic and racial minority groups each have a substantial presence—an increasingly prevalent reality as the American demography continues to diversify. In these communities, it is possible that no single minority population group may rise to the

greater-than-10 percent absolute disparity threshold, but the majority population could well be over-represented relative to their share of the population.

The asymmetry of the absolute disparity model (i.e., its over-sensitivity to disparities of larger distinct groups and under-sensitivity to disparities of small distinct groups) would, in effect, skew jury pools away from ethnic and racial diversity and towards homogeneity. Such a result would undermine the fair-cross-section right as a tool to ensure democratic participation in the jury trial system and the legitimacy and integrity of the courts.

Amici have assessed the national impact of allowance of underrepresentation that does not exceed 10 percent absolute disparity. Based on current U.S. demographics, such a rule would enable the right to a jury chosen from a cross section of the community—a right that belongs to all defendants, of any race or ethnicity, *see, e.g.*, *Taylor*, *supra*—to be denied to the vast majority of individuals and in the vast majority of American courts. All-white juries and near all-white juries could become common, with no remedy in the Constitution or in the courts that enforce it.

The proportions modeled in Table 1 closely track the racial and ethnic makeup of the U.S. jury-eligible population. According to the 2000 Census, non-Hispanic whites make up approximately 70 percent of the jury-eligible population, while African Americans

and Hispanics each compose slightly less than 12 percent.[8]

As illustrated in Table 2, *infra*, based on *amici*'s demographic computations, Petitioner's proposed 10 percent rule would bar fair-cross-section claims alleging underrepresentation of African Americans in over three quarters of U.S. counties, which are home to almost 60 percent of Americans. Fair-cross-section claims brought to ensure Hispanic participation would be unavailable in 92 percent of U.S. counties for over three quarters of Americans. Asian Americans fare even worse, and the guarantee effectively would no longer exist with respect to Native Americans and Hawaiian/Pacific Islanders.

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[8] According to the 2000 Census, non-Hispanic whites are 70.2 percent of the U.S. population ages 18-69, and African Americans and Hispanics are each 11.9 percent of the 18-69 population. Asians are 3.9 percent of the U.S. population, *available at* http://factfinder.census.gov/servlet/DTTable?_bm=y&s_name=DEC_2000_SF1_U&CONTEXT=dt&mt_name=DEC_2000_SF1_U_P005&mt_name=DEC_2000_SF1_U_P012A&-mt_name=DEC_2000_SF1_U_P012B&-mt_name=DEC_2000_SF1_U_P012D&mt_name=DEC_2000_SF1_U_P012H&-mt_name=DEC_2000_SF1_U_P003&-redoLog=true&-currentselections=DEC_2000_SF1_U_P012A&-geo_id=01000US&-format=&-_lang=en (last visited December 13, 2009).

Table 2. U.S. Counties with Distinctive Racial/Ethnic Group of 10% or Less[9]

Distinctive Ethnic or Racial Group	*Counties with 10% or less*	*Percent of U.S. Counties with 10% or less*	*Total Population of Counties with 10% or less*	*Percent of U.S. Population in These Counties*
Non-Hispanic Whites	2	< .1%	19,494	< .1%
African Americans	2351	75.4%	164,930,443	58.6%
Hispanics	2869	92%	214,745,554	76.3%
Asian Americans	3086	98.9%	245,632,050	87.3%
Native Americans	3029	97.2%	278,745,987	99.0%
Hawaiians/Pacific Islanders	3092	99.1%	280,012,701	99.5%

[9] Population figures are based on the 2000 U.S. Census except that the 2006 American Community Survey ("ACS"), part of the Decennial Census Program, was used to calculate racial and ethnic proportions of counties with populations over 65,000. *See* http://www.census.gov/acs/www/Downloads/Handbook2006.pdf. Excluded from the list of 3118 U.S. counties and county equivalents are the 22 smallest independent cities in Virginia for which race and ethnic statistics were not obtained. The Hispanic population is limited to U.S. citizens who are proficient in the English language.

The 10 percent absolute disparity rule would permit an even greater degree of deviation from a fair cross section in multi-ethnic communities where no single minority group exceeds 10 percent. Indeed, in a jury pool that mirrors the national makeup (African Americans and Hispanics at 12 percent each, Asian Americans at 4 percent, and non-Hispanic whites at 70 percent), an almost total exclusion of Hispanics and African Americans and the complete exclusion of Asian Americans would not violate the fair-cross-section guarantee, despite the fact that such exclusion could lead to an underrepresentation of almost a third of the jury-eligible population and a substantial overrepresentation of non-Hispanic whites.

Counties with such diverse population patterns are not hypothetical; increasingly, they can be found throughout the country:

- Clark County, Nevada—which includes Las Vegas, and is home to nearly 1.4 million residents—is composed of 9.6 percent African Americans, 9.7 percent Hispanics, and 7.0 percent Asian Americans.[10]

- Richmond County, New York—which encompasses the borough of Staten

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[10] Population figures are based on the 2000 Census and the 2006 ACS. *See* note 9, *supra*.

Island, New York City, and is home to over 440,000 residents—is composed of 10 percent African Americans, 9.2 percent Hispanics, and 7.4 percent Asian Americans.

- Dupage County, Illinois—which is outside of Chicago, and is home to over 900,000 residents—is composed of 4.3 percent African Americans, 6.3 percent Hispanics, and 9.8 percent Asian Americans.
- Ramsey County, Minnesota—which encompasses St. Paul, and is home to over 500,000 residents—is composed of 9.8 percent African Americans, 2.6 percent Hispanics, and 9 percent Asian Americans.
- Collin County, Texas—a suburb of Dallas, Texas, with a population of over 490,000 residents—is composed of 7.3 percent African Americans, 10 percent Asian Americans, and 5.5 percent Hispanics.
- Multnomah County, Oregon—which includes Portland, and is home to over 660,000 residents—is composed of 5.8 percent African Americans, 6.2 percent Asian Americans, and 3.2 percent Hispanics.
- Pinellas County, Florida—which includes St. Petersburg, and Clearwater, and is home to over 920,000 residents—is

> composed of 9.7 percent African Americans, 2.8 percent Hispanics, and 3.1 percent Asian Americans.

No reasonable person would consider an all-white jury pool to be a fair and reasonable cross section of these communities. Yet adoption of the 10-percent standard would permit such a reality, completely unchecked by the Sixth Amendment's fair-cross-section guarantee.

C. Statistical Significance Does Not Answer The Right Question, Provides Confusing And Misleading Results, And Would Invalidate Minor Underrepresentation

Statistical significance tests[11] are widely used in social science, business, and law. *See generally* Michael O. Finkelstein & Bruce Levin, *Statistics for Lawyers* (2d ed. 2001); *Statistical Science in the Courtroom* (Joseph L. Gastwirth 3d ed. 2000) (providing examples of statistical analysis in employment discrimination cases, criminal sentencing, and forensic DNA profiling). But in statistics

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[11] Statistical significance tests are applied to the distribution of a measure and suggest whether the observed outcome happened by chance, or if it occurred systematically. Statistical significance tests can be applied to different types of distributions, such as a normal distribution (or, in common terms, a bell-shaped curve), or other distributions such as a Poisson, binomial, or chi-squared, where the data typically follow other patterns.

there is not one analysis or principle that fits all situations or applications, any more than there is in law. *See generally Statistics for Lawyers*. Despite its virtues in other applications, the statistical significance test is less useful and of questionable validity in jury composition cases.[12]

The statistical significance test purports to assess underrepresentation by calculating the probability of an observed disparity[13] occurring if the jury pool were drawn randomly from the population. *See*

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[12] Justice Cavanaugh's concurrence, in the Michigan Supreme Court case below, concluded that underrepresentation of African Americans in the Kent County Circuit Court jury pool was statistically insignificant. The court's computation, however, incorporated glaring mathematical errors that substantially affect the results. Appendix ("A") 164a.

The court used a proper arithmetic calculation to determine the standard deviation, but used the wrong data. A 164a. The African American proportion of the Kent County adult population is 7.28 percent or .0728 (and not, as the court calculated, .728) and the non-African American jury-eligible residents should be .9272 and not, as the court calculated, .972 (1—proportion of jury-eligible African Americans). Properly calculated, the standard deviation, rounded to the nearest whole number, is 8. As a result, the difference between the number of African Americans in a fully representational pool, 68, and their actual representation, 55, is just under two standard deviations. This should be compared to the widely accepted threshold of 1.64 standard deviations for statistical significance at the .05 or 5 percent level in a "one-sided" test. The difference therefore was statistically significant.

[13] The probability is actually of an observed or greater disparity occurring; we have omitted "or greater" throughout this brief to avoid confusion.

Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338, 353-56 (1966). If that probability is very low, one concludes that the jury pool was not randomly drawn from the population.[14] The cutoff most often used as the measure of statistical significance is a probability below 5 percent. David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* 83, 124 (Federal Judicial Center 2d ed. 2000).[15]

Use of a statistical significance test for jury composition cases presents two distinct but related problems. First, a statistical significance test does not answer the question the Constitution asks. It does not assess the degree of underrepresentation,

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[14] More precisely, the conclusion is that either something very unusual occurred or the jury pool was not randomly drawn from the population, and the statistical analysis does not tell us which it is.

[15] The results of a binomial test of statistical significance test can be expressed as a probability. It is also common to express statistical significance in terms of standard deviations. When a result is greater than 1.96 standard deviations (for a "two-sided" test), in a normal distribution or in large samples, it is typically regarded as statistically significant at probability ("p") < .05. In *Castaneda*, 430 U.S. at 496 n.17 and *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.4 (1977), this Court described the null hypothesis as "suspect to a social scientist" when statistics from a "large sample" fall more than "two or three standard deviations" from its suspected value under the null hypothesis. These differences produce p-values of about 5 percent and 1 percent respectively. *See Reference Guide on Statistics*, *supra*, at 124 n.138.

nor does it provide a quantitative measure that distinguishes tolerable from unconstitutional underrepresentation. It tells us only what we already know—that the jury pool was not randomly drawn from the population—without providing a measure of the magnitude of any deviation from the cross-sectional norm. *See, e.g., United States v. Rioux*, 97 F.3d 648, 655 (2d Cir. 1996) ("It is illogical to apply a theory based on random selection when assessing the constitutionality of a qualified wheel. By definition, the qualified wheel is not the product of random selection; it entails reasoned disqualifications based on numerous factors.").

Since statistical significance measures the improbability of randomly drawing a jury pool with the observed underrepresentation from the population, its results are highly dependent on the size of the jury pool: the larger the jury pool, the less likely it is to be unrepresentative of the population if it were randomly drawn from that population. *Statistics for Lawyers* at 21-22.

This sensitivity to sample size is connected to the second problem: the results of a statistical significance test depend heavily on the number of people in the jury pool (sample size), not merely on the degree or extent of the underrepresentation. Since common jury pool sizes even in medium and small communities are quite large for statistical purposes—much larger, for example, than sample sizes used

in national attitudinal surveys—small disparities become statistically significant.[16]

For example, Table 1 includes a jurisdiction in which the group is 30 percent of the population and 27 percent of the jury pool (third row). If the jury pool size is only 1,000—small compared to common jury pool sizes[17]—such a minor difference appears statistically significant. Because of its sensitivity to jury pool size, the statistical significance test detects minor disparities as significant in large jury pools and would invalidate too many jury systems.

In short, the statistical significance test has little to recommend it as a standard of jury

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[16] Statistical significance does not always suggest that the difference is meaningful or of practical importance. When sample sizes are sufficiently large, the greater sensitivity of any test will result in statistically significant but extremely small and unimportant differences. *See generally* Stephen T. Ziliak & Deirdre N. McCloskey, *The Cult of Statistical Significance: How the Standard Error Costs Us Jobs, Justice, and Lives* (2008).

[17] The size of jury pools varies greatly across the country. According to a 2003-2006 survey conducted by the National Center for State Courts of 1,223 court districts serving 63 percent of the U.S. population, 25 percent of the surveyed court districts qualified 248 or fewer jurors annually; 25 percent qualified between 249 and 630 jurors annually; 25 percent qualified between 631 and 1,965 jurors annually; 15 percent qualified between 1,966 and 8,496 jurors and 10 percent qualified between 8,497 and 547,613 jurors annually. This information is on file with the National Center for State Courts and was gathered in preparation for its report, Gregory E. Mize et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (April 2007).

representativeness. While widely used for many applications, the test does not respond to the question at the center of the constitutional fair-cross-section guarantee: how should a court distinguish tolerable from unconstitutional underrepresentation in jury pools. Its results are confusing, misleading, and would result in too broad an invalidation of jury systems.

D. By Measuring The Extent Of Underrepresentation, Comparative Disparity Best Measures And Vindicates Claims Of Underrepresentation

The indifference of absolute disparity and statistical significance to the extent of underrepresentation can be resolved by incorporating the size of the underrepresented group into the analysis. This is exactly what the comparative disparity method does.

Comparative disparity measures the degree or extent of underrepresentation on a continuous scale from 0 percent (full representation) to 100 percent (complete exclusion). It is calculated by dividing absolute disparity by the percentage of the distinct group in the overall population. For example, the 70-percent-to-60-percent group from Table 1 has a 14 percent comparative disparity.[18] The 30-percent-to-20-percent group has a 33 percent comparative

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[18] 10/70 x 100%

disparity,[19] and the 12-percent-to-2-percent group has an 83 percent comparative disparity.[20] A completely excluded group that is less than 10 percent of the population (and therefore cannot have a 10 percent absolute disparity) has a comparative disparity of 100 percent.[21]

Many courts, including this Court, have used comparative disparity to evaluate underrepresentation claims. In *Alexander*, for example, the Court considered both comparative disparity (though not by name) and statistical significance to find that a *prima facie* case of intentional discrimination had been established. *See supra*, at note 3.

Other courts have used comparative disparity alone, or in conjunction with absolute disparity, statistical significance, or some other measure. *See,*

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[19] 10/30 x 100%

[20] 10/12 x 100%

[21] This expression of comparative disparity analyzes the reduction of the group's rate of inclusion in the jury pool, equals one minus the rate ratio, and is the one courts use in calculating comparative disparity. Alternately, comparative disparity can be expressed by examining the reduction of the group's odds of inclusion in the jury pool, which equals one minus the odds ratio. For example, the odds of the 70 percent group being included in the pool is the group's proportion / (1—group proportion) or .7/.3 or 2.333. As a result of the reduction in representation, the group's odds of representation are 6/.4 or 1.5. The comparative disparity of the odds is the (odds in the population)—(odds in the pool) / (odds in the population) or (2.333)—(1.5) / 2.333 or 35.7%. *See Statistics for Lawyers* at 37-38.

e.g., *Stephens v. Cox*, 449 F.2d 657, 659 (4th Cir. 1971) (noting that African Americans constituted at least 30 percent of the adult population, but made up only 15 percent of the grand and petit jurors selected for services, resulting in a "disparity of approximately 2-1"); *Berry v. Cooper*, 577 F.2d 322, 326 (5th Cir. 1978) (same); *United States v. Rogers*, 73 F.3d 774, 776 (8th Cir. 1996) (same); *Hirst*, 676 F.2d at 1258 (same); *United States v. Chanthadara*, 230 F.3d 1237, 1257 (10th Cir. 2000) ("The importance of the comparative disparity figure . . . is directly proportional to the size of the group relative to the larger community. We must consider both absolute and comparative disparities to determine whether a violation has occurred.").[22]

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[22] *See also Washington v. People*, 186 P.3d 594, 596 (Col. 2008) (holding that "no specific statistical measure should be excluded in a court's analysis of a constitutional fair cross-section claim, and that a court should evaluate all the statistical evidence presented to determine whether the alleged under-representation is unfair and unreasonable . . . "); *Diggs v. United States*, 906 A.2d 290, 296-97 (D.C. 2006) (noting that "courts generally rely on two concepts or measures (there are others) to determine" whether there is fair and reasonable representation on a jury pool, but denying defendant's fair-cross-section claim because he presented no demographical evidence); *Idaho v. Paz*, 798 P.2d 1, 7-8 (Idaho 1990), overruled on other grounds by *Idaho v. Card*, 825 P.2d 1081 (Idaho 1991) (citing to both absolute and comparative disparity statistics in evaluating underrepresentation on a jury pool); *Azania v. Indiana*, 778 N.E.2d 1253, 1260 (Ind. 2002) (noting that federal courts have adopted both comparative and absolute disparity, and analyzing defendant's claim using a comparative disparity method); *Minnesota v. Williams*, 525 N.W.2d 538, 542-43 (Minn. 1994)

(Continued on following page)

As even some of the courts that have endorsed it have noted, comparative disparity is not without its limitations. It can overstate the underrepresentation of very small groups. That is, when a group is particularly small, the loss of even a few expected members in the jury pool can result in a substantial comparative disparity.[23]

But this limitation is easily overcome, simply by raising the level of comparative disparity required for small cognizable groups. This Court should require 15 percent comparative disparity, except where the distinct group is less than 10 percent, in which case the Court should use 25 percent. *See* David Kairys, Joseph Kadane and

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(holding that "courts should be free to use all the statistical tools available," and refusing "to rely solely upon" absolute disparity, which the court calls a "crude statistical approach"); *Williams v. Nevada*, 125 P.3d 627, 631, n.9 (Nev. 2005) (citing to both absolute and comparative disparity statistics in evaluating underrepresentation on a jury pool).

[23] This is not to say that all such criticism of comparative disparity is valid. Take for example, the common *reductio ad absurdum* argument posed in *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984), of a .000002 distinct group (1 out of 500,000) that suffers 100 percent comparative disparity when excluded from the jury pool. Even if the pool is fully representative in this hypothetical community, the distinct group only has a .0002 percent chance being included in the jury pool, and only if the sole member is otherwise eligible to serve on a jury. Clearly, at some point, the population proportion becomes so small that the results are of no constitutional consequence. This case does not present such an extreme example.

John Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 798 n.112 (1977). Using this two-tiered standard for comparative disparity achieves the method's advantage of adequately quantifying the extent of a group's underrepresentation, while minimizing the possibility that underrepresentation of small distinct groups will be overstated.

Amici's proposed comparative disparity standard—unlike absolute disparity—vindicates the animating principles of the fair-cross-section guarantee. It vigilantly protects the representative jury pool, guards the jury's democratic purpose, and promotes the ideal of the impartial tribunal. *Taylor*, 419 U.S. at 530; *Holland*, 493 U.S. at 480-81. It is also consistent with other bright-line rules this Court has created to safeguard the opportunity for minority participation in the jury system. *See, e.g., Ballew v. Georgia*, 435 U.S. 223, 237 (1978) (finding that a five-member jury violated the Sixth Amendment, in part, because of evidence suggesting it "erect[ed] barriers to representation [of minority groups]").

Amici's proposed rule, like other bright-line rules this Court has created, provides "some degree of certainty so that States and counties"—and, in this case, jury administrators—"may establish procedures with confidence that they fall within constitutional bounds." *County of Riverside v. McLaughlin*, 500 U.S. 44, 53-54 (1991) (holding that the Fourth Amendment requires that a judicial probable-cause determination must generally be made within 48 hours of a

warrantless arrest). The suggested thresholds are, given the technology and the source lists available, easily achievable with reasonable effort and expense. They give jury administrators some flexibility while making it clear that representation should be taken seriously.

Finally, *amici*'s proposed standard will not invalidate otherwise constitutional jury selection procedures. Demonstrating a disparity is only one part of larger inquiry under *Duren*. A disparity larger than the threshold, by itself, will not establish a fair-cross-section claim; systematic exclusion must also be proven. *Duren*, at 364.[24] And even if a claimant establishes a *prima facie* violation, the government may justify its process by demonstrating a significant state interest in the process. *Id.*, at 367-68.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should reject the absolute

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[24] In this case, the siphoning of Grand Rapids jurors from the circuit court jury pool systematically excluded 85 percent of the jurisdiction's jury-eligible African Americans from the circuit court jury pool. A 4a; Joint Appendix 169a. *See* 1990 U.S. Census (85%, or 20,168 out of Kent County's 23,502 adult African American residents lived in Grand Rapids), *available at* http://factfinder.census.gov/servlet/DTTable?_bm=y&context=dt&ds_name=DEC_1990_STF1_&CONTEXT=dt&mt_name=DEC_1990_STF1_P012C&mt_name=DEC_1990_STF1_P012D&-tree_id=100&-redoLog=false&-all_geo_types=N&-geo_id=06000US26081060&search_results=05000US26081&-format=&-_lang=en (last visited December 13, 2009).

disparity measure—and certainly Petitioner's proposal that more than 10 percent absolute disparity must be shown to establish any fair-cross-section claim. Instead, the Court should adopt the comparative disparity method, because it is scientifically valid and consistent with the important constitutional values of the fair-cross-section guarantee.

Respectfully submitted,

ERIK LEVIN*
Counsel of Record
NEW YORK UNIVERSITY SCHOOL OF LAW
245 Sullivan Street
New York, NY 10012
(212) 992-8149

DAVID KAIRYS*
TEMPLE UNIVERSITY SCHOOL OF LAW
1719 North Broad Street
Philadelphia, PA 19122
(215) 204-8959

JACK C. AUSPITZ
MARK DAVID MCPHERSON
LEAH C. FLETCHER
SHIRI BILIK WOLF
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104-0050
(212) 468-8263

Counsel for Amici Curiae

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* individually, and not on behalf of the Universities.